1 MONDAY, MARCH 16, 1953

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10768

TRANSAMERICA CORPORATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

Petition to review and set aside the order of the Board of Governors of the Federal Reserve System

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[Received and filed May 27, 1952. Ida O. Creskoff, Clerk.]

2 IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10768

TRANSAMERICA CORPORATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

Petition to review and set aside the order of the Board of Governors of the Federal Reserve System

To the Honorable the Judges of the United States Court of Appeals for the Third Circuit:

Transamerica Corporation (hereinafter called Transamerica) presents this petition to review and set aside the order entered by the Board of Governors of the Federal Reserve System (here-

inafter called the Board) and, in support thereof, respectfully represents to this Court as follows:

3 I. THE NATURE OF THE PROCEEDING

1. Transamerica is a corporation organized under the laws of the State of Delaware. It is engaged in the business of investment in stocks of various corporations including banks, insurance companies and industrial enterprises. Approximately one-half of its assets consists of bank stocks. Its holdings of bank stocks, which were the subject of inquiry in this proceeding, include a minority interest (now 5.6 percent) in Bank of America National Trust & Savings Association (hereinafter called Bank of America), the head office of which is in San Francisco, California, a minority interest in Citizens National Trust and Savings Bank of Los Angeles, and majority interests in each of 46 banks located in Arizona, California, Nevada, Oregon and Washington.

2. This proceeding was initiated by a complaint issued by the Board on June 24, 1948, and amended on July 19, 1949, charging Transamerica with violation of Section 7 of the Clayton Act. (38 Stat. 731, 15 U. S. C. § 18.) On December 7, 1948, Transamerica moved that the Board dismiss the complaint on the ground that it lacked jurisdiction, since Section 7 was never intended to apply to bank stockholdings. This motion was denied on January 17, 1949. Hearings were commenced on December 7, 1948, before a Governor of the Board who, although lacking any legal training, was designated as a Hearing Officer. They were completed on December 15, 1950. On June 13, 1951, the Hearing Officer issued a Recommended Decision asking the Board to determine that Transamerica's acquisition, holding and use of the stocks of the banks referred to in paragraph 1 above were in violation of

4 Section 7. On September 13, 1951, Transamerica filed exceptions—based in part on the unsupported character of the findings and the arbitrary conduct of the hearing—and renewed its motion to dismiss originally made on December 7, 1948. Oral argument on the motion and exceptions was had on December 11, and 12, 1951, and on March 27, 1952, the Board issued the orders, review of which is now sought. The Board denied all of Transamerica's exceptions, denied its motion to dismiss, and adopted *in toto* the text of the Hearing Officer's Recommended Decision. The Board's "Findings as to the Facts, Conclusion and Order" were joined in by three of the seven members of the Board including the Hearing Officer, whose recommendations and rulings were the subject of Transamerica's specific exceptions, and who participated over Transamerica's objection and cast the decisive vote. Two Governors dissented, and two did not participate in the decision.

3. The orders which Transamerica here asks the Court to review and set aside direct Transamerica to cease and desist from violating Section 7 and further direct it to divest itself of all of the stock which it holds in each of the banks referred to in paragraph 1 above, except its 5.6% minority interest in Bank of America. The drastic and sweeping character of this divestiture order may be seen from the fact that the 46 stock interests to be divested are carried on Transamerica's books at a figure over $28,000,000, and constitute about 25% of all its investments.

II. Facts and Statutes Upon Which Jurisdiction and Venue Are Based

1. This petition is filed pursuant to Section 11 of the Clayton Act (38 Stat. 734, 15 U. S. C. § 21), which provides, in part, that any party required by an order of the Board to cease and desist from a violation charged may obtain review of such order by applying to the Court of Appeals of the United States within any circuit where such person resides.

2. Transamerica satisfies the foregoing jurisdictional and venue requirements. As a corporation organized under the laws of the State of Delaware it resides within this circuit.

III. Points on Which Transamerica Intends to Rely

1

(a) The Board has no jurisdiction to issue the orders which Transamerica seeks to have set aside. Section 7 was never intended to apply to the acquisition of stocks in banks, as is demonstrated by the language of the Act, its legislative history, the pattern of banking legislation both before and since the Act, and the Board's own long-standing interpretation of the Act.

(b) The Board should have granted Transamerica's motion to dismiss the complaint made on December 7, 1948, and renewed on September 13, 1951.

2

(a) The facts of record and the findings of the Board itself disclose that 38 of the banks named in its orders were not, at the time Transamerica acquired their stock, in actual or potential competition with any other bank in which Transamerica owned stock.

(b) Moreover, there was no proof, and the Board did not find, that any of the remaining banks named in its orders were in actual or potential competition with any other bank in which Transamerica owned stock.

6 (c) The orders, therefore, must be set aside because Section 7 does not prohibit stock acquisitions in corporations that are not in actual or potential competition with one another.

3

(a) The facts of record demonstrate that there has not been, and that there probably will not be, any substantial lessening of competition between the banks in which Transamerica owns stock, and the Board has made no findings to the contrary.

(b) The orders must, therefore, be set aside because there can be no finding that Section 7 has been violated by the acquisition of stock in banks in the absence of factual proof that such stock acquisitions have brought about, or probably will bring about, a substantial lessening of competition between the banks whose stock has been acquired.

(c) The Board's findings that Transamerica has sought to secure control of Citizens National Trust & Savings Bank of Los Angeles and its branches, and that it has the purpose to acquire control of that bank are contrary to the evidence on the whole record and unsupported by substantial evidence.

(d) The Board's finding that the effect of Transamerica's "holding and use" of the stocks ordered divested "may be to substantially lessen competition and restrain commerce in commercial banking in the States of California, Oregon, Nevada, Arizona, and Washington, and tend to create a monopoly in such line of commerce in said area" is contrary to the evidence on the whole record and unsupported by substantial evidence.

7 4

(a) The Board failed and refused to make inquiry into the factors and circumstances relating to competition or tendency to create a monopoly in the provision of banking services and, in particular, it failed and refused to appraise the effect of Transamerica's acquisitions and holding of bank stocks upon competition and monopoly—or what the courts have described as the probable effect of the challenged stock acquisitions upon the "public interest."

(b) The Board erroneously excluded relevant and probative evidence demonstrating the absence of any prejudicial effect upon the "public interest," including offers to prove:

(1) The strength and character of existing competition.

(2) Freedom of entry into the business of providing banking services.

(3) The quantity and quality of banking services available to the public and the high and growing degree of competition between concerns providing such services.

(4) The intention, purposes, circumstances, and consequent probable effects underlying Transamerica's various separate acquisitions of bank stock.

(5) The complete absence of characteristics that might indicate developing monopoly in the provision of banking services, such as interest rate rigidity, excess of facilities, or deterioration of services.

8 (c) Moreover, the Board failed and refused to give any consideration to factors peculiar to the provision of banking services. As the dissenting opinion of Governor Powell pointed out, for example, "The record makes it clear, and the Board's Solicitor has never denied that keen competition is present in the five states," and "over-banking has been a curse in past years," and the supervisory banking authorities have had to guide their intensive and continuing regulation of banking accordingly. These various factors differentiate banking from other types of business activity and require an especially informed and precise appraisal in a Section 7 proceeding, which the Board did not make. The Board excluded evidence offered by Transamerica, which would have demonstrated certain of the competitive factors peculiar to the banking business, and thereby committed serious and prejudicial error.

5

(a) The orders must be set aside because the Board, in determining whether Transamerica's bank stockholdings may lessen competition or tend to create a monopoly in violation of Section 7, relied almost exclusively on percentages of "market occupancy." Thus, the Board stated that the "controlling facts" in its decision were the percentages of commercial banking offices, deposit liabilities, loans, and deposit accounts allegedly controlled by Transamerica.

(b) Market occupancy percentages are a most inadequate measure of the probable effect of Transamerica's stock

9 acquisitions upon competition or monopoly because, among other reasons, they reflect internal growth (which accounts for 85 to 90 percent of the figures relied upon by the Board), and growth through establishment of new offices and asset acquisitions, none of which falls within the purview of Section 7. Moreover, the percentages relied upon by the Board have the effect of charging Transamerica with responsibility for bank failures and mergers with which it concededly had no connection whatsoever.

(c) The percentages relied upon by the Board reflect only num-

bers of unrelated banking offices and deposit accounts, and totals of deposits and loans. In the absence of a qualitative analysis going to the size of banking offices, kinds of demand deposits, types of loans and character of deposit accounts, which analysis the Board refused to undertake, mere numbers and totals afford no accurate measure of competitive significance or monopoly power. They were correctly characterized in the dissenting opinion of Governor Powell as "purely a statistical compilation without validity."

6

(a) The Board's findings as to the existence of a "Transamerica group" of banks under the control and direction of Transamerica, and that Bank of America, with 85 percent or more of the deposits, loans and banking premises attributed to Transamerica, was one of such a group, all of which findings are concededly basic to its conclusion that Section 7 has been violated, are contrary to the evidence on the whole record, and unsupported by substantial evidence.

(b) Transamerica's holdings of bank stocks were acquired solely for investment in accordance with the exception provided in Section 7, and the Board's finding to the contrary is against the weight of the evidence on the whole record, and unsupported by substantial evidence.

(c) Transamerica has never, in fact, controlled or directed the policies, activities or operations of Bank of America in which it now holds a 5.6 percent interest, and does not now control or direct or have any power to control or direct such policies, activities or operations. The Board's conclusion to the contrary is against the weight of the evidence on the whole record, is unsupported by substantial evidence, and is inconsistent with the Board's own finding that Transamerica does not control the day to day details of operation of Bank of America.

7

(a) The Board excluded evidence offered by Transamerica which would have demonstrated the intense, continuing and effective competition between "commercial banks" and other types of institutions in the provision of banking services, and would have established that "commercial banking" is not a distinct "line of commerce" within the meaning of Section 7, thereby committing serious and prejudicial error.

(b) The Board's findings respecting the nature of "commercial banks," the character of their operations and the degree of dominance of the market enjoyed by them are contrary to the evidence on the whole record, and unsupported by substantial evidence.

(c) The Board's finding that "commercial banking" constitutes a distinct "line of commerce" within the meaning of Section 7 is contrary to the evidence on the whole record, and is unsupported by substantial evidence.

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(a) The Board confined its entire inquiry into lessening of competition and tendency to create a monopoly to those "commercial banks" having head offices located in Arizona, California, Nevada, Oregon, and Washington. Its selection of this segment of the United States and this limited group of banks from among those doing business in that area as the basis for its inquiry under Section 7 was completely arbitrary, and the entire record contains no evidence that the segment is economically distinct or constitutes the area of effective competition for any of the banks involved in this proceeding.

(b) The Board excluded evidence offered by Transamerica which would have established the appropriate geographical areas in which banks involved in this proceeding do compete and the banks with which they compete with respect to the various services offered by them, thereby committing serious and prejudicial error.

9

(a) The hearing was conducted in an arbitrary and discriminatory manner by the Hearing Officer, and the Board approved his conduct, thereby depriving Transamerica of its constitutional right to a fair hearing.

(b) Transamerica was deprived of a fair hearing because improper and arbitrary restrictions were put on its right to cross-examination.

(c) Transamerica was deprived of a fair hearing because
12 the Hearing Officer did not apply the same evidentiary standards to Transamerica as he did to counsel for the Board, as is shown, among other things, by the fact that evidence was received when offered by the Board's counsel and evidence of identical character was excluded when offered by Transamerica.

(d) Transamerica was deprived of a fair hearing because evidence was excluded which would have rebutted inferences drawn by the Board from the misleading statistics upon which reliance was placed, and which would have refuted the allegations of the complaint.

(e) Transamerica was deprived of a fair hearing because the Board's lack of the power of subpoena deprived Transamerica of the right to compel witnesses to testify, and the Hearing Officer re-

fused to assist Transamerica in its efforts to obtain the appearance of important witnesses who were unwilling to testify voluntarily.

(f) Transamerica was deprived of a fair hearing because the major portion of the evidence received in support of the complaint should have been excluded since it was obtained in the course of examinations conducted under the visitorial powers of the Board and of other bank supervisory agencies, and was, therefore, privileged.

(g) Transamerica was deprived of a fair hearing because a substantial portion of the evidence received in support of the complaint was not "reliable, probative and substantial evidence," as required by Section 7 (c) of the Administrative Procedure Act (60 Stat. 241, 5 U. S. C. §1006(c)).

13 10

(a) The Board and its Hearing Officer should have granted Transamerica's request that the Governor of the Board who had acted as Hearing Officer be disqualified and not permitted to sit in judgment on Transamerica's exceptions to his findings and recommendations and to his conduct of the hearing.

(b) The serious prejudice to Transamerica resulting from the refusal by the Board and the Hearing Officer himself to disqualify the Hearing Officer from participation in the review of his own decision is seen in the fact that the final decision rendered by the Board, which adopted all of the findings and recommendations of the Hearing Officer, was rendered by a margin of 3 to 2, with the Hearing Officer casting the decisive vote.

11

The orders must be set aside because the Board erred in failing to uphold the exceptions filed on behalf of Transamerica under date of September 13, 1951.

IV. The Relief Prayed

Wherefore, Transamerica prays that:

1. A copy of this petition be forthwith served by the Clerk of this Court upon the Board of Governors of the Federal Reserve System, in accordance with Rule 18 (1) of this Court.

2. Said Board be required forthwith, in accordance with the requirements of Section 11 of the Clayton Act, to certify and file in this Court a transcript of the record in the proceedings entitled "In the Matter of Transamerica Corporation."

14 3. This Court specifically direct that the filing of this petition shall operate as a stay of the effectiveness of the

Board's order in the above-mentioned proceedings dated March 27, 1952, a copy of which is annexed to this petition.

4. This Court review and set aside the Board's orders dated March 27, 1952, in the above-mentioned proceedings.

5. This Court grant such other and further relief as it may deem appropriate.

Respectfully submitted.

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JOHN LORD O'BRIAN,
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Of Counsel.

MAY 27, 1952.

15 UNITED STATES OF AMERICA BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

IN THE MATTER OF TRANSAMERICA CORPORATION

* * * * *

ORDER

It is ordered that respondent, Transamerica Corporation, a corporation, cease and desist from violating the provisions of section 7 of "an Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (38 Stat. 731, 15 U. S. C. § 18), in the manner set out in the findings as to the facts herein; and it is specifically ordered that said respondent divest itself fully and completely of all capital stock, whether directly or indirectly owned or controlled by it, of each of the following named banks:

IN CALIFORNIA

Central Bank, Oakland,
The First National Bank of Garden Grove, Garden Grove,
Bank of Pinole, Crockett,
Central Bank of Calaveras, San Andreas,
The First National Bank of Fairfield, Fairfield,
The Temple City National Bank, Temple City,
The First National Bank of Weed, Weed,
First Trust and Savings Bank of Pasadena, Pasadena,

The First National Bank of Bellflower, Bellflower,
16 First National Bank in Corcoran, Corcoran,
The First National Bank of Los Altos, Los Altos,
Bank of Newman, Newman,
First National Bank in Santa Ana, Santa Ana,
First National Trust and Savings Bank of Santa Barbara, Santa Barbara,
Bank of Tehachapi, Tehachapi,
The First National Bank of Crows Landing, Crows Landing,
The First National Bank of San Jacinto, San Jacinto,
Farmers & Merchants Bank of Watts, Los Angeles,
Citizens National Trust and Savings Bank of Los Angeles, Los Angeles,
The First National Bank of Mountain View, Mountain View,
The First National Bank of Oakdale, Oakdale,
First National Bank in Turlock, Turlock,
Bank of Beaumont, Beaumont,
First National Bank in Delano, Delano,
American Commercial & Savings Bank, Moorpark,
Stanislaus County Bank, Oakdale,

IN OREGON

The First National Bank of Portland, Portland,
The First National Bank of Forest Grove, Forest Grove,
Coolidge & McClaine, Silverton,
Moreland-Sellwood Bank, Portland,
Clatsop County Bank, Seaside,
The First National Bank of Cottage Grove, Cottage Grove,
The First National Bank of Prineville, Prineville,
The Scio State Bank, Scio,
Bank of Sweet Home, Sweet Home,
17 The First National Bank of Eugene, Eugene,
Benton County State Bank, Corvallis,
Carlton State & Savings Bank, Carlton,
Yamhill State Bank, Yamhill,
Monroe State Bank, Monroe,
The First National Bank of Lebanon, Lebanon,
State Bank of Malheur County, Ontario,

IN NEVADA

First National Bank of Nevada, Reno,
Farmers' Bank of Carson Valley (Inc.), Minden,
Bank of Nevada, Las Vegas,

IN ARIZONA

First National Bank of Arizona, Phoenix,

IN WASHINGTON

National Bank of Washington, Tacoma;

that said divestment be made in good faith, and that none of the capital stock of any of said banks be sold or transferred directly or indirectly to any presently existing or later organized or acquired subsidiary or affiliate of respondent, or to any director, officer, employee, agent, or nominee thereof, or to any person acting for or in behalf, or subject directly or indirectly to the control, of respondent or of any of its subsidiary or affiliated companies or of any director, officer, employee, agent, or nominee thereof; that said divestment be made without using or attempting to use any of the said capital stock in any manner in directly or indirectly acquiring or conveying to others any of the assets of any of said banks; and that said divestment be made in such manner that each of said banks may continue to operate as a going con-
18 cern wholly independent of respondent; that action to bring about said divestment be initiated by respondent within 90 days after service of this order upon it, and that said divestment be completed within two years and 90 days after said service of this order.

IT IS FURTHER ORDERED that within 90 days after the service of this order upon it, respondent file with this Board a report in writing showing in detail the action which it has then taken, and which it intends to take, in compliance with this order; that within one year after the expiration of said 90 days respondent file with this Board a report in writing showing in detail the action which it has then taken, and which it intends to take, in compliance with this order; and that within two years and 90 days after said service of this order respondent file with this Board a report in writing showing in detail the manner and form in which it has completed compliance with this order.

This 27th day of March, 1952.

By the Board.

(Signed) S. R. CARPENTER,
Secretary.

[SEAL]

19 MONDAY, MARCH 16, 1953

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10768

TRANSAMERICA CORPORATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

Application for leave to adduce additional evidence

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[Received and filed May 27, 1952. Ida O. Creskoff, Clerk.]

20 IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10768

TRANSAMERICA CORPORATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

Application for leave to adduce additional evidence

To the Honorable the Judges of the United States Court of Appeals for the Third Circuit:

Transamerica Corporation (hereinafter called Transamerica) presents this application for leave to adduce additional evidence upon a hearing before the Board of Governors of the Federal Reserve System (hereinafter called the Board) and, in support thereof, respectfully represents to this Court as follows:

1. Transamerica is filing simultaneously with this appli-
21 cation a petition to review and set aside orders of the Board issued March 27, 1952, in proceedings before the Board entitled "In the Matter of Transamerica Corporation."

2. Among the "Points on Which Transamerica Intends to Rely" in said petition are listed numerous references to the exclusion of evidence offered by Transamerica in the above-mentioned proceedings. This evidence was relevant and material and the failure to adduce such evidence was due solely to the erroneous rulings of the Hearing Officer in excluding it, and of the Board in affirming his rulings. Transamerica took specific exceptions to the rulings of the Hearing Officer excluding such evidence and these exceptions were specifically overruled by the Board.

3. Section 11 of the Clayton Act, 38 Stat. 734, 15 U. S. C. § 21, as amended, pursuant to which Transamerica has filed its petition for review, contains the following provision:

"If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if
22 supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence."

4. The evidence erroneously excluded by the Board consists of the following:

(1) Evidence which would establish the geographical area in which banks involved in this proceeding compete with respect to the various services they offer.

(2) Evidence which would establish that banks involved in this proceeding receive substantial competition in all categories of their business from many effective competitors other than banks offering services substantially identical with those of such banks, and which would prove the nature and extent of such competition, the identity of the competitors and the changes which have taken place in the quantity and quality of such competition.

(3) Evidence which would prove the nature and effect of other factors, which are more important than acquisitions, upon the growth, development, and competition of banks, including particularly those banks involved in this proceeding, and which would establish that the nature and amount of services provided by banks are continually changing and that they change in accord-

ance with (a) the nature and amount of bank and nonbank competition; (b) management policies; and (c) the aggressiveness with which particular services are offered either by banks or by their nonbank competitors.

23 (4) Evidence which would prove that Bank of America N. T. & S. A., in which Transamerica holds a minority interest of 5.6%, and the banks in which Transamerica has a majority interest grew as a result of providing a greater variety of services to a greater number of people, and by constant effort to render services which were better in quality and cheaper in cost than those offered by competitors.

(5) Evidence which would prove (a) that Transamerica's principal purpose in acquiring stocks of banks has been to obtain and hold profitable and diversified investments by aiding in the creation and development of state-wide branch banks along sound business lines; (b) the business advantages of branch banking both to public and to stockholders, and the experience of the banks named in the complaint in demonstrating those advantages; and (c) the pattern of mergers and consolidations in the banking field showing the increasing general trend toward branch banking in consequence of the general recognition of those advantages.

(6) Evidence which would prove that the intent and effect of the transactions by which Bank of America N. T. & S. A. and Transamerica's majority-owned banks have extended their facilities have been to give more and better service to more people over a wider area.

(7) Evidence which would prove the reasons why the assets or stock of certain banks were acquired and the circumstances surrounding the rejection of proposals by persons wholly

24 unrelated to Transamerica that the stock or assets of particular banks be acquired.

(8) Evidence which would prove that there has been and is no tendency to create a monopoly or lessening of competition in the banking business in the five states of Arizona, California, Nevada, Oregon and Washington, or elsewhere.

(9) Evidence which would prove facts explaining or qualifying facts proved by counsel for the Board or that certain of his contentions were unsound, invalid or unwarranted, including evidence (a) that Transamerica does not control Bank of America N. T. & S. A.; (b) that Transamerica had a valid investment purpose in acquiring stock of Citizens National Trust and Savings Bank of Los Angeles and never sought to control that bank; (c) that actual or prospective public injury is essential to the existence of a tendency toward monopoly or a substantial lessening of competition; (d) that a monopoly of banking is improbable, if not impossible; (e) that Bank of America and Transamerica's

majority-owned banks have grown in a manner consistent with and similar to the development of the entire banking structure of the United States.

(10) Evidence excluded by arbitrary and discriminatory rulings, under which evidence of identical character was admitted when offered on behalf of the Board.

Wherefore Transamerica respectfully applies to this Court for:

25 1. Such relief with respect to the adducing of additional evidence in this proceeding before the Board of Governors of the Federal Reserve System as may be appropriate in the light of the action taken by this Court on the petition for review filed simultaneously herewith.

2. Such other and further relief as it may deem appropriate.

Respectfully submitted.

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MAY 27, 1952.

26 MONDAY, MARCH 16, 1953

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10768

TRANSAMERICA CORPORATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

Amendment to application for leave to adduce additional evidence

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NOVEMBER 24, 1952.

[Received and filed November 24, 1952. Ida O. Creskoff, Clerk.]

27 IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10768

TRANSAMERICA CORPORATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

Amendment to application for leave to adduce additional evidence

Transamerica Corporation hereby amends its Application for Leave to Adduce Additional Evidence, filed in this proceeding on May 27, 1952, by adding thereto on page 5 of the printed Application, prior to the prayer for relief, the following paragraph:

5. Evidence of events occurring since the Board rendered its decision and since the Application was filed in this Court, negating the Board's finding that Transamerica controls Bank of America, as follows:

28 (1) Evidence that Mr. L. M. Giannini died on August 19, 1952, and that there are no longer any common officers or directors between Transamerica and Bank of America.

(2) Evidence that on October 20, 1952, Transamerica sold 1,341,085 shares of Bank of America stock to the public; that neither Transamerica nor any of its subsidiaries now owns any stock in Bank of America whatsoever; and that Transamerica's long-range program to dispose of all its interest in Bank of America has been completed.

Respectfully submitted.

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JOHN LORD O'BRIAN,
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NOVEMBER 24, 1952.

29 UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10768

TRANSAMERICA CORPORATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

Petition to review the order of the Board of Governors of the Federal Reserve System

Argued March 16, 1953

Before MARIS, GOODRICH and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 16, 1953)

By MARIS, *Circuit Judge.*

Transamerica Corporation, a corporation of Delaware, has petitioned this court to review an order of the Board of Governors of the Federal Reserve System entered against it under Section 11 of the Clayton Act to enforce compliance with Section 7 of the Act. The Board's complaint was issued June 24, 1948, charging Transamerica with having violated Section 7 in that for many years it and its predecessors have continuously and systematically been acquiring the stocks of independent commercial banks located in the five States of California, Oregon, Nevada,
30 Washington and Arizona, and that the effect of such acquisitions may be to substantially lessen competition, restrain commerce or tend to create a monopoly.

Hearings were held on the Board's complaint before a member of the Board as hearing officer. The hearing officer submitted recommended findings to the Board to which exceptions were filed. After hearing the exceptions the Board, two members dissenting, on March 27, 1952, entered the order here challenged, finding that Transamerica's acquisitions and ownership of the stocks of the various banks named in the complaint constituted a violation of Section 7 of the Clayton Act and requiring Transamerica to divest itself of all such stocks, except that of Bank of America National Trust and Savings Association, within an overall period of two years and ninety days.

At the outset we are confronted with a question of jurisdiction. Transamerica sought to have the Board's complaint dismissed and here seeks to have it set aside upon the ground that under Section 11 of the Clayton Act the only authority given to the Board is to enforce compliance with those sections of the Act which are "applicable to banks, banking associations and trust companies," and that the provisions of Section 7 here sought to be enforced do not apply to such institutions. To determine the validity of this contention we turn first to the language of Section 7 of the Clayton Act, which is as follows:

"SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

31 "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition. * * *"[1]

It will be seen that the significant language of Section 7 is that "No corporation shall acquire * * * the stock * * * of two or more corporations engaged in commerce where the effect of such acquisition * * * may be" that denounced by the section. This language is so clear and unambiguous as to leave no room for con-

[1] 38 Stat. 730, 731–732, 15 U. S. C. (1946 Ed.), § 18. Section 7 was amended in 1950. 64 Stat. 1125. The amendment is prospective only. The proceedings here in question were conducted and the order under review was entered under Section 7 as it existed prior to the amendment.

struction.[3] Its sweep includes all "corporations engaged in commerce" without exception. The Board found, and Transamerica does not contest the finding, that the commercial banks the stocks of which are here involved were engaged in interstate commerce.[3] Those banks must, therefore, be held to be within the purview of Section 7.

32

Transamerica argues that Congress has not in the past regulated the banking business by legislation directed to corporations generally but rather by special banking legislation and it says that the legislative history indicates that Congress did not intend to depart from this practice in the Clayton Act. In particular Transamerica points to Section 8 of the Act which deals specifically with interlocking directors of banks.

It may readily be admitted that Congress has in the past customarily dealt with the banking business by special legislation directed solely to that end. This it did under its fiscal and currency powers.[4] Indeed more than 100 years ago the Supreme Court had held that banking was not commerce.[5] It is, therefore, doubtless true that the members of Congress in enacting Section 7 of the Clayton Act in 1914 did not specifically contemplate that "corporations engaged in commerce" would include banks. We find nothing in the legislative history, however, to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent. The avowed purpose of the Clayton Act was to supplement the Sherman Act by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act. Since the general language of the Sherman Act was designed by Congress "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements"[6] the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope.

33

We turn then to the merits of the case. The Transamerica group had its origin in 1904 when A. P. Giannini organized the Bank of Italy (now Bank of America National Trust and Savings Association) with headquarters in San Francisco. This bank is said to be the largest bank in the world, due principally to the fact that more than 550 independent banks and branches in the State of California have been acquired and either converted into branches of Bank of America or merged or consolidated with it.

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[3] Lewis v. United States, 1875, 92 U. S. 618, 621; Standard Co. v. Magrane-Houston Co., 1922, 258 U. S. 346, 356.

[3] This finding was clearly correct. National Labor Relations Board v. Bank of America, etc., 9 Cir. 1942, 130 F. 2d 624, 626, cert. den., 318 U. S. 791, 792; United States v. South-Eastern Underwriters Association, 1944, 322 U. S. 533.

[4] McCulloch v. Maryland, 1819, 17 U. S. 316; Osborn v. Bank of United States, 1824, 22 U. S. 738; Farmers' and Mechanics' National Bank v. Dearing, 1875, 91 U. S. 29.

[5] Nathan v. Louisiana, 1850, 49 U. S. 73.

[6] United States v. South-Eastern Underwriters Association, 1944, 322 U. S. 533, 558.

Until 1917 these acquisitions were made by individual officers of the bank, who pledged their personal credit when stock of an independent bank was being purchased. In that year Stockholders Auxiliary Corporation, a Transamerica predecessor, was organized and this company thereupon acted as purchaser of independent banks in California destined for inclusion within the Bank of America system.

In 1918 another corporation, Bancitaly Corporation was organized by A. P. Giannini, the largest stockholder of which was Stockholders Auxiliary Corporation. This company acquired the stocks of various banks located in New York City and certain foreign countries. Later on it also acquired stock interests in California banks. In 1924 still another corporation was formed called Americommercial Corporation and it, too, acquired controlling stock interests in California banks. In 1928 Transamerica Corporation, the petitioner here, was organized to take over stock control of Bank of America and its affiliated companies. Since that time Transamerica has acted as purchaser of independent banks in California for Bank of America.

In 1930 Transamerica acquired The First National Bank of Portland, Oregon, which has since become the principal
34 Transamerica branch banking system in that state. In 1934 it acquired the First National Bank in Reno, Nevada, the name of which has subsequently been changed to First National Bank of Nevada. In 1936 it acquired the National Bank of Tacoma, Washington, the name of which was later changed to National Bank of Washington. In 1937 it acquired the First National Bank of Arizona at Phoenix, the Phoenix National Bank and the Phoenix Savings Bank & Trust Company (the latter being an affiliate of the Phoenix National Bank). The Phoenix National Bank and the First National Bank of Arizona at Phoenix were later consolidated as the First National Bank of Arizona. Numerous subsequent acquisitions of independent banks were made by Transamerica in these four states, most of which have been converted into branches of the banks just mentioned.

Commencing in 1937 Transamerica, which then held substantially all the stock of Bank of America, began a program of voluntary disposal of these holdings. In that year it distributed 58% of this stock to its own shareholders. By 1948 Transamerica's holdings of Bank of America stock had been reduced to 22.88% and by 1951 to 7.66%. On October 20, 1952, the last of the stock was disposed of so that today Transamerica has no stock interest whatever in Bank of America. Also upon the death of L. M. Giannini on August 19, 1952, the two corporations ceased to have any

director in common.[7] The Board, nonetheless, in its findings of fact included Bank of America in the Transamerica banking group, along with 47 majority owned banks which Transamerica had acquired in the five states, since it regarded Transamerica as still exercising effective control over Bank of America in spite of its then comparatively small stock interest. The Board did not include Citizens National Trust and Savings Bank of Los Angeles, in which Transamerica also has a minority stock interest,
35 however, since it did not find that Transamerica exercises control over that bank.

The Board's findings of fact set forth the growth, by years, in banking offices, deposits and loans of the Transamerica banking group. This growth has been steady. The Transamerica group controls approximately 645 or 41% of all commercial-banking offices in the five-state area. In addition the Transamerica group holds approximately 39% of all commercial-bank deposits and approximately 50% of all commercial-bank loans in the five-state area.[8] On the basis of such overall figures as these and without any findings as to the competitive effect of Transamerica's bank acquisitions in the communities in which the banks operate the Board reached its conclusion that the acquisitions violated Section 7 of the Clayton Act and accordingly called for the order of divestment here under review.

It will be recalled that Section 7 makes unlawful the acquisition of the stock of two or more corporations engaged in interstate commerce where its effect "may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, * * * or tend to create a monopoly of any line of commerce." The contention of Transamerica is that the Board's findings wholly fail to furnish support to the conclusion that the effect of Transamerica's acquisitions of bank stocks may be to substantially lessen competition between the acquired banks or that those acquisitions may tend to create a monopoly in the banking business.

We think that Transamerica's contention with respect to substantial lessening of competition must be sustained. The ban imposed by Section 7 in this regard is solely against stock acquisitions which may have the effect of substantially lessening competition between the companies acquired. The application
36 of this clause obviously requires a preliminary determination of the area of effective competition between the companies involved before the question of competition between them

[7] These events of 1952 do not appear in the record but Transamerica has asked leave to introduce evidence establishing them and the Board concedes that they have occurred. Brief for respondent, p. 66.

[8] If the business of Bank of America were excluded these percentages, according to Transamerica's Exhibit 271, would be only 7% of deposits and 6.5% of loans.

may be considered. The Board has made such a determination in this case, finding that the business of commercial banks is largely local and confined to the communities in which they operate and in which customers may conveniently visit them. The Board made this finding in subparagraph (f) of Paragraph Seven of its findings of fact, as follows:

"Because of the frequency of need for access to one or more of the services of commercial banks, such banks draw their business largely from areas within which customers may conveniently visit the banks as occasion may require. Thus, in this aspect of their customer relations, commercial banks are largely local, and for the usually needed customer services a distant bank cannot adequately serve a customer. Very large concerns with national credit standing have access to credit from banks in many parts of the country and may also maintain accounts in widely scattered banks. This does not apply, however, to the great multitude of the customers of commercial banks. The smaller concerns, local business enterprises, and ordinary citizens must depend upon their local commercial bank or banks for the financial services peculiar to such banks; for all these customers there is no alternative or substitute, because distantly located banks do not serve or supply their needs."

Likewise it must appear that substantial competition exists between the acquired companies which may be subject to substantial lessening as the result of their acquisition by a common owner.[9] In the present case the Board has made no findings with respect to either present or possible future competition between the individual acquired banks in the communities in which they operate. Indeed, it rejected evidence on this subject offered by Transamerica. Moreover as to 38 of the acquired banks there could hardly be a finding of such competition since none of them is located in the same community as any other acquired bank. While the remaining 10 banks are not eliminated by this geographic test the mere showing of common ownership will not support an inferential finding that competition between them exists and may be lessened.[10]

The Board's ultimate finding on this score was "that the effect of its [Transamerica] holding and use of such stocks may be to substantially lessen competition and restrain commerce in commercial banking in the States of California, Oregon, Nevada, Arizona, and Washington." This finding is deficient in two re-

[9] International Shoe Co. v. Federal Trade Commission, 1930, 280 U. S. 291, 298; Federal Trade Commission v. Thatcher Mfg. Co., 3 Cir. 1925, 5 F. 2d 615, 622, aff. in part, 272 U. S. 554, 560; V. Vivaudou, Inc. v. Federal Trade Commission, 2 Cir. 1931, 54 F. 2d 273. Compare United States v. Columbia Steel Co., 1948, 334 U. S. 495, 527.

[10] Temple Anthracite Coal Co. v. Federal Trade Commission, 3 Cir. 1931, 51 F. 2d 656; Pennsylvania R. Co. v. Interstate Commerce Commission, 3 Cir. 1933, 66 F. 2d 37.

spects. It is not directed to competition between the acquired banks, the only competition with which Section 7 is concerned. And it sets up a five-state area of competition for which there is no support in the evidence and which is inconsistent with its own specific finding on this point to which we have already referred. So far as concerns the portion of this finding that the effect of these stock acquisitions may be to restrain commerce in commercial banking in the five-state area it is sufficient to say that the Board did not refer to it in this court either in its brief or in oral argument and evidently does not rely upon it.

We turn then to the consideration of the Board's conclusion that Transamerica's bank stock acquisitions violate Section 7 of the Clayton Act because they may tend to create a monopoly in the commercial banking business in the five state area. The Board states its theory thus: Because of governmental restrictions
38 there are only a limited number of commercial banking offices serving the public in any designated area. Principally as a result of hundreds of acquisitions of independent banks one small banking institution organized in San Francisco in 1904 has been built into a vast integrated network of 645 banks and branches now located over a five-state area. These offices represent 40.9% of all commercial banking offices in that area, and they hold 38.8% of all deposits and 49.9% of all commercial loans therein. Despite the tremendous growth of population and economic activity in that area in recent years, the total number of all banking offices therein has decreased since Transamerica was organized in 1928, while the number of banking offices in the Transamerica group has increased during that time. By every applicable standard in assessing the economic power of an integrated group of banks, that of the Transamerica group has been always on the increase. Furthermore, Transamerica is constantly seeking to acquire additional banks and, unless restrained, intends to do so. Because the Transamerica acquisitions have systematically and continuously eliminated competition over the years, and because its total of controlled banking offices has been steadily increasing as a result of such acquisitions, thus demonstrating a patent, not to say inexorable, movement in the direction of monopoly, the Board concludes that the cumulative effect of such acquisitions may be to create a monopoly within the five-state area.

It will be seen that the Board paints with an exceedingly broad brush. By cumulating the acquisition of banks by Transamerica throughout the five-state area and including Bank of America (in which Transamerica no longer has any stock interest) the Board shows the growth of a banking group which, it asserts, is moving toward a monopoly in banking in the five states. We agree that this quantitative analysis discloses a tremendous concentration

of banking capital, and thereby of economic power, in the hands of the Transamerica group which may be unwise and against sound public policy. It may well be in the public interest to curb the growth of this banking colossus by appropriate legislative or administrative action. This, however, is not for us to decide. Our only question is whether the theory upon which the Board based its decision meets the legal tests which are required under Section 7 of the Clayton Act to determine whether Transamerica's bank stock acquisitions tend to create a monopoly of commercial banking. We are compelled to agree with Transamerica that it does not do so.

A monopoly involves the power to raise prices or to exclude competition when the monopolist desires to do so.[11] Obviously, under Section 7 it was not necessary for the Board to find that Transamerica has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud. Since by definition monopoly involves the power to eliminate competition a lessening of competition is clearly relevant in the determination of the existence of a tendency to monopolize. Accordingly in order to determine the existence of a tendency to monopoly in the commercial banking or any other line of business the area or areas of existing effective competition in which monopoly power might be exercised must first be determined. The Board in this case apparently regards that area as comprising the five states of California, Oregon, Nevada, Arizona, and Washington. This, however, is inconsistent with the Board's own finding that the local community in which a commercial bank is located is its area of competition. Moreover it is a mere assumption by the Board wholly unsupported by evidence. No valid reason is shown for taking five states rather than one, the seven included in the federal reserve district or all 48. The Board's conclusion of a tendency to monopoly in the five-state area, therefore, fails for want of a supporting finding that the five states constitute a single area of effective competition among commercial banks and flies in the face of its own finding that the local community is the true competitive banking area.

We, of course, do not hold that no tendency to monopoly by Transamerica in commercial banking could be shown in any of the competitive areas in which its acquired banks operate. It may well be that in some of these areas Transamerica through the acquisition of banks has brought about a substantial lessening in competition and in that and other ways has moved measurably toward monopoly power in those particular areas. The Board has

[11] American Tobacco Co. v. U. S., 1946, 328 U. S. 781, 811.

made no such findings, however, nor has it made appropriate supporting findings as to the factors which an analysis of the market would disclose to be relevant to the determination of these questions. It has been held that such findings are necessary under Section 7.[12]

The Board does not deny that the cases which have been decided under Section 7 have interpreted and applied that section as we do here. But it asserts that these cases have all been overruled by the opinion of the Supreme Court in Standard Oil Co. v. United States, 1949, 337 U. S. 293, in which Section 3 of the Clayton Act was held violated upon the mere showing that by the use of the exclusive dealing contracts there involved competition had been foreclosed in a substantial share of the line of commerce affected. We do not think that the Standard Oil case has any such effect. Section 3 of the Clayton Act deals with exclusive dealing contracts, not with stock acquisitions. The use of exclusive dealing contracts per se lessens competition, however, so that the fact of lessening need not be proved. For one who agrees to purchase all his requirements from a single seller is legally barred from purchasing them from anyone else and is consequently eliminated en-
41 tirely from the competitive market. In order to establish a substantial lessening of competition in such a case, therefore, it is only necessary in addition to prove that the sales covered by the exclusive dealing contracts amount to a substantial portion of the total involved in the competitive market area.[13] This is precisely what was held in the Standard Oil case.

The situation with respect to corporate stock acquisitions, the subject matter of Section 7, is wholly different, however. For the acquisition of the stock of two or more corporations engaged in interstate commerce is not per se a violation of the section.[14] On the contrary such acquisition is a violation only if its effect may be in fact to substantially lessen competition between such corporations, to restrain commerce or to tend to create a monopoly. Otherwise the acquisition is entirely lawful, so far as Section 7 is concerned. It necessarily follows that under Section 7, contrary to the rule under Section 3, the lessening of competition and the tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked. Evidence for mere size and participation in a substantial share of the line of business involved, the "quan-

[12] International Shoe Co. v. Federal Trade Commission, 1930, 280 U. S. 291, 298–299; Aluminum Co. of America v. Federal Trade Com'n, 3 Cir. 1922, 284 F. 401, cert. den. 261 U. S. 616; V. Vivaudou, Inc. v. Federal Trade Commission, 2 Cir. 1931, 54 F. 2d 278.

[13] In the Standard Oil case Justice Frankfurter said: "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition." 337 U. S. 293, 299–300, note 5.

[14] International Shoe Co. v. Federal Trade Commission, 1930, 280 U. S. 291, 298.

titative substantiality" theory relied on by the Board, is not enough.

The same considerations serve to distinguish this case from International Salt Co. v. U. S., 1947, 332 U. S. 392, upon which the Board also relies. For that case involved contracts tying sales of an unpatented product, salt, to a patented one, a machine for its use. These contracts, the court pointed out, closed against competition the market for salt by those persons who bought the machines. The contracts therefore per se violated the antitrust laws as to the salt to be purchased under the contracts regardless
42 of its amount. The Supreme Court so interpreted the case in United States v. Columbia Steel Co., 1948, 334 U. S. 495, 522.

We conclude that since the Board failed to find the facts as to lessening competition and tendency to monopoly in the areas of effective competition actually involved, its order is unsupported by the necessary findings and cannot stand.

Since we hold that the Board's order must be set aside we need not discuss Transamerica's contentions that it was denied a fair hearing by the manner in which the proceedings were conducted by the Board's hearing officer and by the inability of the Board to provide it with subpoenas to compel the attendance of witnesses and the production of documents. Nor need we consider Transamerica's application for leave to introduce additional evidence to prove that it has now disposed of the remainder of its Bank of America stock and that following the death of L. M. Giannini the two corporations have no longer a common director. For if the Board should decide, in the light of this opinion, to proceed further against Transamerica that corporation will, of course, have full opportunity to introduce this and all other relevant evidence to which its application for leave was directed.

The order of the Board of Governors of the Federal Reserve System will be set aside.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

43 UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10768

TRANSAMERICA CORPORATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

Judgment

Present: MARIS, GOODRICH, and KALODNER, *Circuit Judges.*

This cause came on to be heard on the transcript of record from the Board of Governors of the Federal Reserve System, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the order of the Board of Governors of the Federal Reserve System be, and it is hereby set aside.

Attest:

HARRIET G. HUMPHREYS,
Deputy Clerk.

JULY 16, 1953.

[Received and filed July 16, 1953. Ida O. Creskoff, Clerk.]

44 UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10768

TRANSAMERICA CORPORATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT

Present: MARIS, GOODRICH, and KALODNER, *Circuit Judges.*

Upon consideration of the application by petitioner for leave to adduce additional evidence, as amended, and after hearing,

It is ordered that the application be, and it is hereby denied, without prejudice.

By the Court,

MARIS, *Circuit Judge.*

JULY 17, 1953.

[Received and filed July 17, 1953. Ida O. Creskoff, Clerk.]

45 No. 10768

TRANSAMERICA CORPORATION, PETITIONER ON REVIEW,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, RESPONDENT ON REVIEW

Mandate

[Received and filed August 6, 1953. Ida O. Creskoff, Clerk.]
[Copy.]

46 JULY 16, 1953.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Board of Governors of the Federal Reserve System:

GREETING:

Whereas, lately in the Board of Governors of the Federal Reserve System before you or some of you, in a cause between Transamerica Corporation, Petitioner, Petitioner on Review and Board of Governors of the Federal Reserve System, Respondent (Respondent on Review) an order was entered by the Board of Governors of the Federal Reserve System on March 27, 1952, which order is of record in the office of the Board of Governors of the Federal Reserve System, to which reference is hereby made, and the same is hereby expressly made a part hereof,
as by inspection of the transcript of record of the said Board of Governors of the Federal Reserve System which was brought into the United States Court of Appeals for the Third Circuit by virtue of a petition by Transamerica Corporation agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said transcript of record, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this court that the order of the Board of Governors of the Federal Reserve System be, and it is hereby set aside.

47 You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said petition notwithstanding.

Signed and sealed this 6th day of August in the year of our Lord one thousand nine hundred and fifty-three.

IDA O. CRESKOFF,
Clerk, United States Court of Appeals for the Third Circuit.

48 I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original proceedings in this court in the case of Transamerica Corporation, Petitioner, vs. Board of Governors of the Federal Reserve System, No. 10768, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 24th day of September in the year of our Lord one thousand nine hunderd and fifty-three, and of the Independence of the United States the one hundred and seventy-eighth.

[SEAL] IDA O. CRESKOFF,
Clerk of the United States Court of Appeals, Third Circuit.

49 IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. ——

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

TRANSAMERICA CORPORATION

Stipulation

It is hereby stipulated and agreed, by and between counsel for the respective parties to the above-entitled cause, that, for the purpose of the petition for writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the Joint Appendix and the following portions of the proceedings had before the United States Court of Appeals for the Third Circuit:

1. Petition to review and set aside the order of the Board of Governors of the Federal Reserve System—filed May 27, 1952.

2. Application for leave to adduce additional evidence—filed May 27, 1952.

3. Amendment to application for leave to adduce additional evidence—filed November 24, 1952.

4. Opinion—filed July 16, 1953.

5. Judgment setting aside the order of the Board of Governors of the Federal Reserve System—filed July 16, 1953.

6. Order denying application for leave to adduce additional evidence—filed July 17, 1953.

7. Order of July 16, 1953, setting aside the order entered on March 27, 1952, by the Board of Governors of the Federal Reserve System.

8. Clerk's certificate.

It is further stipulated and agreed that, in addition to the joint appendix, petitioner will cause the Clerk of the United States Court of Appeals to certify up to the Supreme Court of the United States the entire proceedings, and that the parties hereto may, if they deem it necessary, refer in their briefs and argument to any portions of the proceedings omitted from printing.

Robert L. Stern,
ROBERT L. STERN,
Acting Solicitor General,
Counsel for Petitioner.

GERHARD A. GESELL,
Counsel for Respondent.

OCTOBER 2, 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 410

BOARD OF GOVERNORS OF THE FEDERA RESERVE SYSTEM, PETITIONER

v.

TRANSAMERICA CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Acting Solicitor General, on behalf of the Board of Governors of the Federal Reserve System, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered in the above-entitled case on July 16, 1953.

OPINION BELOW

The opinion of the Court of Appeals (R. 10075) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1953 (R. 10085). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In a proceeding under Section 7 of the Clayton Act brought by the petitioner, the Board of Governors of the Federal Reserve System, the Board found that respondent, a holding company, had "proceeded steadily" for many years in a "persistent and continuing" policy of acquiring commercial banks in the states of California, Oregon, Nevada, Washington and Arizona; had brought under its control in this five-state area 41 percent of all banking offices, 39 percent of all bank deposits, 50 percent of all bank loans, and 46 percent of all deposit accounts—these being the appropriate yardsticks for measuring control of the business of commercial banking;— and had both the purpose and the power to continue to enlarge its occupancy of the field of commercial banking in the five-state area. The Board, on the basis of these and other subsidiary findings, made the ultimate finding that respondent's acquisitions tended to create a monopoly of commercial banking in the states of California, Oregon, Nevada, Washington and Arizona. The Board's resultant order required respondent to divest itself of its stockholdings of a number of banks. The court below set aside that order upon the ground that the foregoing finding lacked the support of necessary subsidiary findings; the court particularly stressed the absence of a finding that the five states "constitute a single area of effective competition among commercial banks."

The question presented is whether the Board's

findings that respondent's continuing acquisitions have, in their total impact and cumulative effect, vested in respondent (1) control over a substantial portion of commercial banking in five states, (2) a monopoly of such business in numerous communities in these states, and (3) power to exclude potential competition, adequately support the finding that the acquisitions have, as to the five-state area, a monopolistic tendency which brings them within the prohibitions of Section 7 of the Clayton Act, notwithstanding the absence of findings that each individual acquisition, considered separately, itself had such tendency.

STATUTE INVOLVED

Section 7 and 11 of the Act of October 15, 1914, 38 Stat. 730, as amended,[1] commonly known as the Clayton Act, provide in part as follows:

> Sec. 7 * * *
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise,

[1] This proceeding was brought under the Clayton Act prior to the amendment of that Act in 1950. The amendment (64 Stat. 1125) made no substantive change in the tendency to monopoly standard with which this petition is exclusively concerned. (See *infra*, p. 11, n. 19.) The principal changes were (1) the broadening of Section 7 to prohibit, in the case of corporations subject to the jurisdiction of the Federal Trade Commission (*i.e.*, not banks), acquisitions of assets as well as stock; and (2) to omit, under the substantial elimination of competition standard, the requirement that such competition had to be between the acquiring and the acquired corporations.

may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce [15 U.S.C. 18].

* * * * *

Sec. 11. Authority to enforce compliance with sections 2, 3, 7 and 8 of this Act by the persons respectively subject thereto is hereby vested * * * in the Board of Governors of the Federal Reserve System where applicable to banks, banking associations, and trust companies * * * . [15 U.S.C. 21.]

STATEMENT

By an amended complaint (R. 93-111) issued under Section 11 of the Clayton Act on July 19, 1949,[2] the Board of Governors of the Federal Reserve System charged that Transamerica Corporation's acquisition of controlling stock interests in a substantial number of commercial banks in California, Oregon, Nevada, Washington and Arizona had had the effect of substantially lessening competition, restraining commerce, or tending to create a monopoly, in violation of Section 7 of the Act. After full administrative proceedings,[3] the

[2] The original complaint was issued on June 24, 1948 (R. 1-19).

[3] Extensive hearings were held before a member of the Board as hearing officer, the hearing officer filed a recommended decision, respondent filed exceptions, both parties filed briefs, and the Board heard oral argument (R. 362).

Board (two members dissenting (R. 402)) [4] on March 27, 1952, concluded that Transamerica's acquisition, holding and use of the stocks of 48 specified banks was in violation of Section 7 (R. 399), and entered an order (R. 400-1) directing Transamerica to divest itself of 47 of them.

The Board's Findings—The pertinent findings of the Board are as follows:

Transamerica is a holding company (Par. One (a), R. 363). The Transamerica banking group [5] had its origin in a bank organized in 1904 by A. P. Giannini in San Francisco, California (Par. Three (a), R. 367). Giannini and his associates acquired a number of other banks between 1904 and 1928 (*ibid.;* Par. Three (b), R. 367-368). Transamerica was organized by Giannini in 1928 for the purpose, *inter alia,* "of facilitating control and management through a single corporation of the banks and other corporations theretofore operated under his general direction," which were transferred to Transamerica (Pars. One (a), Three (c), R. 363, 368). The "Transamerica group * * * continued its aggressive policy of acquiring other banks and extending and expanding its opera-

[4] Two members did not participate.

[5] In addition to its banking interests—which also include 7.2 percent of the stock of The National City Bank of New York —Transamerica holds all the stock of a sizable real estate financing company and of three large insurance companies, and majority interests in a number of industrial companies (Par. One (c), R. 365-366). Two of these insurance companies have written insurance on automobiles whose purchase was financed by the Bank of America, Transamerica's principal banking subsidiary (Par. Five (i) (2), R. 381). See also Par. Five (i) (3)-(6).

tions" (Par. Four (a), R. 369) and, beginning in 1930, began to acquire banks outside California (Par. Four (b), R. 369-370).

The Transamerica group has "proceeded steadily" in a "persistent and continuing expansion" since its founding in 1904 (Par. Eight (b) (1), R. 388-389). Between 1904 and June 30, 1948, Transamerica acquired 679 banks and branches in the States of California, Oregon, Nevada, Washington and Arizona (Par. Eight (b)(3), R. 390).[6] By the latter date, Transamerica controlled 645 banking offices,[7] or 40.95 percent of all banking offices in the five-state area (Par. Eight (b)(1), R. 388). In California, Transamerica's offices increased from 352 in 1928 to 556 in 1948—the latter figure constituting 50.86 percent of all banking offices in the state—while non-Transamerica offices decreased from 968 to 537 (Par. Eight (b) (1) and (2), R. 388-389). For the five-state area, Transamerica's total offices increased from 565 in 1937 (the first year in which Transamerica expanded into the last of the five states) to 645 in 1948, while non-Transamerica banks decreased from 951 to 930 (*ibid.*). The latter changes occurred during a period in which the population of the five-state area

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[6] During the same period, Transamerica established 233 new branches (Par. Eight (b)3), R. 390). A number of these banks and branches subsequently were merged, consolidated, absorbed, or discontinued (*ibid.*).

[7] For these statistics, the Board used the term "bank" to denote the corporate entity (including its main banking office), and the term "banking office" to denote the physical premises on which banking operations were conducted. Thus, a bank with four branches ordinarily would have five banking offices.

increased by 70 to 80 percent, and income and business generally increased by much larger percentages (Par. Eight (b) (2), R. 389).[8]

Transamerica's share of total bank deposits in the five-state area increased from 31.27 percent in 1937 to 38.85 percent in 1948 (Par. Eight (c), R. 392),[9] and its share of total bank loans in the area increased, during the same period, from 32.24 percent to 49.97 percent (Par. Eight (d), R. 393). Transamerica accounted for $2,271,971,000 of the $3,826,313,000 increase in such bank loans, or approximately 60 percent (*ibid.*, R. 394).[10]

Bank of America—which, by its own statement, is "the world's largest bank" (Par. Six (d), R. 384)—was the "hard core" around which the Transamerica-controlled banking group was built, and still is the "center and principal support" for that group (Conclusion, R. 399). From 1928 to 1937, Transamerica held more than 99 percent of the stock of Bank of America (Par. Five (a), R. 371). Although distributions to stockholders and sales had, when the Board's order was issued, reduced Transamerica's holdings to 5.6 percent

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[8] As of December 31, 1947, there were 152 communities in the five-state area in which Transamerica had acquired from one to five banks and was operating the only banking office. In 96 communities Transamerica had acquired from one to five banks and was operating one of the two banking offices. In 8 communities Transamerica had acquired and was operating the two existing banks (Par. Eight (b) (3), R. 390).

[9] As of September 30, 1949, Transamerica had 46.2 percent of the total *number* of deposit accounts in the five-state area (Par. Eight (g), R. 395).

[10] In California, Transamerica had approximately 90 percent of the total increase in bank loans ($2,128,083,000 of $2,348,281,000) from 1928 to 1948 (Par. Eight (d), R. 394).

(*ibid.*),[11] Transamerica's "effective control" has "not [been] interrupted" (Par. Five (c)(1), R. 373), and Transamerica still controls and directs the bank's "major policies and activities" (Par. Five (j), R. 382).

Many factors, "tangible and * * * intangible," have "contributed to and aided in the continuance of this control to the present time, and promise its continuance in the future" (Par. Five (c)(1), R. 373). Important intangible factors include the history of "Giannini management" of Transamerica and its affiliates, the long established relationships among members of this group, the long and continuous service of most of its important officials, the "expectation and acceptance" of policy direction, and the momentum of established policies and procedures (Par. Five (e), R. 376).[12] In 1948, the directors of Bank of America were, with very few exceptions, either long term employees of, or had been closely connected with, the Transamerica group for many years, and could neither have been elected nor continued as directors without Transamerica's "approval and sup-

[11] In 1937 Transamerica distributed to its stockholders 58 percent of its Bank of America stock (Par. Five (a), R. 371). By 1948 its holdings had been reduced to 22.88 percent (*ibid.*). The Board found that even if Transamerica were required to divest itself of all of its Bank of America stock, the existing control relationships between the two companies would continue (Conclusion, R. 399). After the Board's decision, Transamerica sold the remainder of its Bank of America stock, and, as a result of the death of L. M. Giannini (son of A. P. Giannini), the two companies ceased to have any common directors (R. 10084).

[12] A number of other factors are discussed in the Board's findings (Par. Five (c)-(i), R. 373-382).

port." (Par. Five (f), R. 378).[13] Officers and personnel are "freely moved" from Bank of America to other banks controlled by Transamerica, and from such banks to Bank of America (Par. 5 (h)(4), R. 380-381).[14] Since Transamerica became a minority stockholder of Bank of America in 1937, Bank of America has performed a "wide variety of services" for Transamerica which are inconsistent with cessation of control (Par. Five (h)(2), R. 379).[15]

The commercial banks' monopoly of money-payment and money-creation functions and their market domination of short-term business credit,[16] together with the fact that substantially all who require the services of commercial banks must rely upon those banks to which they have ready access, [17]

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[13] Fourteen of Bank of America's 25 directors in 1948 had been members of the 1937 Board which Transamerica had elected when it held more than 99 percent of the bank's stock (Par. Five (f), R. 376); 12 of the directors had also been directors and/or officers of Transamerica or its non-bank subsidiaries in various years since 1937 (Par. Five (g), R. 378).

[14] When Transamerica offered to purchase the stock of a bank in 1941, it agreed that, if any officers or employees of that bank lost their jobs as a result of management policy, it would endeavor to find them jobs with Bank of America (Par. Five (i)(5), R. 382).

[15] Such services have included assisting Transamerica in acquiring other banks (Par. Five (h)(2), R. 379-380), and auditing and examining Transamerica's bank and non-bank subsidiaries (Par. Five (h)(3), R. 380).

[16] Commercial banks have "no substantial competition * * * from any source" in performing these functions (Par. Seven (b), R. 385).

[17] While very large concerns with national standing have access to credit from and maintain accounts in banks in many parts of the country, the "great multitude" of commercial bank customers—smaller concerns, local business enterprises, and ordinary citizens—must depend upon their local commercial

gives such banks "much power" over the business affairs of their local area. They can overextend credit by lending too freely and too much, restrict credit so as to "hamper growth and development," and discriminate among business enterprises and individuals. (Par. Ten (a), R. 398.)

Authorization from regulatory agencies is required before new banks or branches may be established. Such agencies consider the effect of the new bank upon existing banks and the availability of business to support the new bank, and seek to avoid overbanking. Although a bank may not lawfully buy the stock of another bank, a holding company such as Transamerica is not so restricted. The size and resources of a large banking group enable it to enter a community before a bank clearly is warranted and, by establishing a branch which does not have to be immediately profitable, pre-empt promising areas and "anticipate and block" the organization of a local bank. As the size and resources of a banking group increase, so does its power to suppress potential competition. Its "size alone" may "discourage and prevent" the establishment of competing independent banks, or induce existing small banks which do, or are likely to, compete with it, to sell out. (Par. Ten (b), R. 398.)

The Board noted that the "significant standards" under Section 7 were the number of com-

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bank, and cannot satisfy their banking needs through distantly located banks (Pars. Seven (f), R. 387; Ten (a), R. 398).

mercial banking offices, volume of deposit liabilities, volume of loans, and number of deposit accounts, of which Transamerica-controlled banks had, in the five-state area, approximately 41 percent, 39 percent, 50 percent, and 46 percent, respectively; and that despite the tremendous growth of population and wealth in the area, Transamerica's expansion had been accompanied by a decrease in the number of independent banking offices, a substantially higher relative increase in deposits in Transamerica-controlled banks than in others, and the absorption by such banks of "practically all" of the total increase in bank loans (Par. Ten (c), R. 399). The Board concluded that Transamerica had the "purpose and the power" to continue to acquire additional banks (*ibid.;* Par. Six (e), R. 384);[18] and that the effect of Transamerica's holding and use of its bank stocks may be to tend to create a monopoly in commercial banking in the five-state area (Par. 10 (c), R. 399).[19]

The Board's order (R. 400) directed Transamer-

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[18] The Board noted that Transamerica's general reputation among bankers in the area is "one of constantly seeking to acquire more banks" (Par. Six (b), R. 383).

The Board's findings also describe Transamerica's attempts, in 1942 and 1943, to acquire control of a large bank in Los Angeles (Par. Nine, R. 396-397). Although the attempt failed, Transamerica "continued its efforts" to buy stock in the bank (R. 397), and by April, 1949, held more than 20% of the stock (*ibid.;* R. 110). Since 1943 Transamerica has elected 5 of the 21 directors of this Bank (R. 397).

[19] The Board also found that the effect may be to substantially lessen competition and restrain commerce in commercial banking in the area (Par. 10 (c), R. 399). Petitioner does not seek review of the Court of Appeals' rejection of those findings.

ica to cease and desist from violating Section 7, and to divest itself of the stocks of 47 banks.[20]

The Decision of the Court of Appeals—The Court of Appeals for the Third Circuit set aside the Board's order.[21] The court stated that, since monopoly involves the power to eliminate competition, a lessening of competition is "clearly relevant" in determining the existence of a tendency to monopoly (R. 10082); that under Section 7 it was not necessary for the Board to find that Transamerica had achieved monopoly power "but merely that the stock acquisitions under attack have brought it measurably closer to that end" (*ibid.*); that the Board's findings disclosed a "tremendous concentration of banking capital, and thereby of economic power which may be unwise and against sound public policy"; and that "it may well be that in some of these [competitive] areas [in which its acquired banks operate] Transamerica through the acquisition of banks has brought about a substantial lessening of competition and in that and other ways has moved measurably toward monopoly power in those particular areas" (R.

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[20] The Board did not require divestiture of Bank of America, on the theory that such divestiture would be a useless act and would not terminate the existing control relationship (R. 399-400).

[21] Prior to discussing the merits of the case, the court held that Section 7 of the Act applies to banks. The court stated that the Act covers "all 'corporations engaged in commerce' without exception," and that there was nothing in the legislative history of the Section to show—as Transamerica argued—that Congress intended to exclude banks (R. 10077). See *infra*, p. 20, n. 30. It does not seem necessary in this petition to summarize the evidence showing that the banks are in interstate commerce. Cf. Board Findings, Par. Two, R. 366-367; *infra*, p. 17, n. 26.

10081-2). The court further stated, however, that in order to establish a tendency to monopoly under Section 7, evidence of mere size and participation in a substantial share of the line of business involved is "not enough," since the tendency to monopoly "must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked" (R. 10083-4); that the "areas of existing effective competition in which monopoly power might be exercised" must first be determined (R. 10082), and that the Board's finding of a tendency to monopoly in the five-state area:

> fails for want of a supporting finding that the five states constitute a single area of effective competition among commercial banks and flies in the face of its own finding that the local community is the true competitive banking area [*ibid.*].[22]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the Board's supporting findings were insufficient to sustain its ultimate finding that Transamerica's acquisition, use and holding of the stocks of a number of banks tended to create a monopoly in violation of Section 7 of the Clayton Act.

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[22] The Court of Appeals did not pass upon Transamerica's contention that it had been denied a fair hearing, or its application for leave to introduce additional evidence to show that it had disposed of all its Bank of America stock and that the two corporations no longer had any common directors (R. 10084)—facts which the Board does not dispute.

2. In holding that the Board could not base its finding that Transamerica's bank stock acquisitions tended toward monopolization of commercial banking in a five-state area upon its findings as to the cumulative effect of such acquisitions on the banking business in that area.

3. In holding that the Board's order was defective because of the absence of a finding that the five states in which the bank stock acquisitions were made "constitute a single area of effective competition among commercial banks."

REASONS FOR GRANTING THE WRIT

Petitioner asks this Court to review one issue: whether the tendency to monopoly standard of Section 7 of the Clayton Act is satisfied by a showing of the cumulative effect of a large number of acquisitions on the economic situation in the entire area in which they are made, or whether, as the court below held, the validity of each individual acquisition must be determined separately in relation to the particular "competitive areas in which * * * [the] acquired * * * [companies] operate" (R. 10082).

This question is an exceedingly important one in the application of the Clayton Act to the banking system of the nation—not only because of this case, but also because of the existence of a score of other bank-holding companies.[23] And the impact of the Clayton Act on stock acquisitions is, of course, not limited to bank holding

[23] See *infra*, p. 21, n. 31.

companies, so that this question reaches to every similar program of acquisition whatever the type of business involved.

1. (a). The thrust of Section 7 of the Clayton Act is not limited to individual acquisitions which of themselves may tend to monopoly, but also reaches a series of acquisitions whose cumulative effect may have that tendency, even though no particular acquisition, considered alone, may do so. Thus, when Congress amended Section 7 in 1950, it recognized that "[a]cquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as a result of a series of acquisitions." H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8.[24] These amendments did not declare a "new policy" (see *supra*, p. 3, n 1) or make any substantive changes with respect to the tendency to monopoly provision involved in this case; they were merely a "more explicit expression of the purpose of the prior law,"

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[24] The Senate Report pointed out that the amendments were designed to deal with the fact that "[i]mminent monopoly * * * is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them * * *. Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four concerns produce the entire supply." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 5. The quoted language was taken by the Senate Committee from a Federal Trade Commission report on "The Merger Movement."

and their legislative history is a proper aid in construing that law. *Jordan* v. *Roche,* 228 U. S. 436, 446. The Clayton Act, which was designed to "arrest the creation of * * * monopolies in their incipiency" (S. Rep. No. 698, 63d Cong., 2d Sess., p. 1), must be read, we submit, as empowering the Board to intervene in the "cumulative process [of acquisition] when the effect * * * may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize (H. Rep. No. 1191, *supra,* p. 8).

The Board's findings clearly demonstrate that Transamerica's bank acquisitions have long since reached that point. The findings detail a pattern of "persistent and continuing expansion" by the Transamerica group since its founding. From a single bank in 1904 Transamerica has, through the acquisition of 679 banks and branches, reached the point where it now controls approximately 40 per cent of the entire commercial banking business in the five state area where it operates. This expansion of Transamerica was paralleled by a corresponding decline in the share of the market held by non-Transamerica banks. A company which has thus captured 40 per cent of a market to which access is restricted because of government regulation, which has the "purpose and power" to continue to acquire additional banks, and whose economic strength enables it to suppress potential competition, has travelled far enough along the

road toward monopoly power to empower the Board to step in and take appropriate remedial action against it. The Board does not have to "await arrival at the goal [of actual monopoly] before condemning the direction of the movement." *International Salt Co.* v. *United States,* 332 U. S. 392, 396.

(b) The fact that the primary market area of an individual commercial bank is the local community is not inconsistent with the Board's finding that the cumulative effect of a series of bank acquisitions by a holding company is a tendency toward monopoly in the entire area in which it operates. Section 7 refers to acquisitions which may tend to create a monopoly "of any line of commerce." "Line of commerce" is a concept broad enough to cover banking in a five-state area. And, since Section 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 2, makes it illegal to monopolize any part of interstate commerce which is a substantial segment thereof, either from a geographical standpoint or from the standpoint of classes of products moving in such commerce,[25] it necessarily follows that a "tendency toward monopoly" of such commerce within a particular area must be deemed within the reach of Section 7.[26] For the Clayton Act was designed to deal with monopolies "in their incipiency."

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[25] *Indiana Farmer's Guide* v. *Prairie Farmer Co.,* 293 U. S. 268, 279; *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 226.

[26] The Board's finding (Par. Two, R. 366-367) that the commercial banks whose stock acquisitions are at issue in this case are engaged in interstate commerce was, as the Court of Appeals noted (R. 10077), not contested by Transamerica.

Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346, 356; S. Rep. No. 698, 63d Cong., 2d Sess., p. 1.

Thus, the Court of Appeals' holding that the Board was required to find "that the five states constitute a single area of effective competition among commercial banks" (R. 10082) appears grounded upon its erroneous construction of Section 7. Under the Act, the Board is empowered to deal with illegal tendency to monopoly in any area in which it finds that tendency. Since the five state area is the one in which Transamerica conducts its business, the Board was required to determine whether, within this particular area, Transamerica's acts were such as to create a tendency to monopoly of banking operations. Whether or not the five states constitute an area within which individual commercial banks may compete with each other, the Board's findings were sufficient to show that Transamerica was tending toward a monopoly of *all* commercial banking in that area.

Moreover, as the Board found (*supra*, pp. 10-11). Transamerica's power to suppress potential competition at the local level stems from the substantial portion of the total banking resources which it has acquired in the five-state area.[27] The very existence of this power to "suppress potential competition" (R. 398) itself shows the requisite tendency to monopoly which Section 7 of the Clayton

[27] This power is operative not only within the individual community, but also as between neighboring communities where it would be practicable for the local residents to seek banking assistance.

Act condemns. *Aluminum Co. of America* v. *Federal Trade Commission,* 284 Fed. 401 (C.A. 3), certiorari denied, 261 U.S. 616.

(c) The fact of the matter is that Transamerica's acquisitions have tended to monopoly in the only comprehensive sense in which a monopoly can exist in the banking business. It dominates, through its ownership and control of banks throughout the area in which it operates, the banking in five states. Yet the restrictive interpretation placed upon Section 7 by the court below would deny the Board any effective weapon for dealing with this "banking colossus" (R. 10082). For, although the court below recognized that the Board's findings disclosed a "tremendous concentration of banking capital, and thereby of economic power, in the hands of the Transamerica group which may be unwise and against public policy" (R. 10081-2), it nevertheless construed the Act to require the Board to determine the relationship between particular acquisitions and the local "competitive areas in which [Transamerica's] acquired banks operate" (R. 10082). But the extent of Transamerica's economic power is not measured solely by the number of local monopolies it has achieved in particular communities; it is also measured by the substantial share of the banking business which it now controls in the five state area. Indeed, few, if any, of the individual acquisitions, examined alone, could be shown to have the prohibited tendency.[28] By thus lim-

[28] Thus, in many of the local areas where Transamerica acquired the only bank in town, there obviously had been no prior local competition, and the acquisition imposed no demonstrable competitive restraint.

iting the scope of the Board's inquiry, the decision below would, as a practical matter, virtually vitiate the Board's power to deal with Transamerica's "tremendous concentration of banking capital, and * * * of economic power."

In like manner, the cases upon which the court below relied, for its restriction of the Board's ability to terminate Transamerica's ownership of the majority of banks in the five-state area, dealt with acquisitions of one manufacturing company by another, and not with the cumulative effect of a large number of acquisitions by a holding company.[29] As the Board had found (Par. Seven (f), R. 387), a commercial bank draws its customers primarily from its own local area. Banking, accordingly, has little of the traditional type of commercial competition between industrial firms which competitively invade market areas far from their home offices.

In sum, the Court of Appeals' quite correct holding (R. 10077) that Section 7 of the Clayton Act applies to banks[30] would have little practical significance if the Board were to be denied the power to deal with the cumulative broad impact of bank acquisitions in a relatively wide geographical area

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[29] *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291; *Aluminum Co. of America* v. *Federal Trade Commission*, 284 Fed. 401 (C.A. 3), certiorari denied, 261 U. S. 616; *V. Vivaudo, Inc.* v. *Federal Trade Commission*, 54 F. 2d 273 (C.A. 2) (R. 10083). Further, the *International Shoe* case did not involve the tendency to monopoly provision of Section 7; it dealt with the provision prohibiting stock acquisitions whose effect may be to substantially lessen competition between the acquiring and the acquired companies.

[30] In so holding, the court stated that the language of Section

upon the general banking situation in that area. Under the decision below, a few bank holding companies similar to Transamerica, operating in various sections of the country, could completely control the banking of this nation, with the petitioner powerless to intervene.[31] A decision which—viewed from the standpoint of banks alone—can lead to such results, obviously presents a question of importance for this Court to review.

2. The case in its present posture is clearly ripe for review by this Court. The holding of the court below does not turn merely on the failure of the Board to make certain allegedly necessary findings. For these subsidiary findings (as to the "effective area of competition among banks") would be necessary only if the correct test of tendency to

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7, relating to stock acquisition, was so "clear and unambiguous" as to leave no room for construction. "Its sweep," the court noted, "includes all 'corporations engaged in commerce' without exception." (R. 10076-7.) The court stated that there was nothing in the Act's legislative history to show—as Transamerica argued—that "Congress did not intend by Section 7 to exercise its power under the Commerce clause of the Constitution to the fullest extent" (R. 10077).

[31] In 1950, the Board presented to a Senate Subcommittee data which showed that, as of December 31, 1948, there were twenty bank holding companies which the Board regulated as holding company affiliates under the Banking Act of 1933, 48 Stat. 186, 12 U.S.C. 61. Hearings Before a Subcommittee of the Committee on Banking and Currency, United States Senate, 81st Cong., 2d Sess., on S. 2318, p. 53. These 20 holding companies had 12.88 per cent (1231 of 9555) of the total commercial banking offices in the 23 states in which they operated, and had 18.58 per cent of the total commercial bank deposits in those states. *Ibid.*, p. 56. Although Transamerica was the largest of these bank holding companies, there were a number of others of substantial size. A New Jersey company had 98 banking offices, two Minnesota companies had 91 and 80, respectively, and a Massachusetts company had 78. *Id.*, p. 54.

monopoly were the one applied by the court below. If, as is our position, the correct standard was that actually applied by the Board, the Board's findings were fully adequate to sustain its order. The sufficiency of the Board's findings can be determined only by first deciding the substantive issue of statutory interpretation which this petition presents.

This is not a situation where a reviewing court has remanded a case to an administrative agency for further proceedings, and the correctness of that decision may be adequately tested upon review of the second agency order. Cf. *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 198-199. Here, as in *United States* v. *General Motors Corp.*, 323 U. S. 373, 377, the correctness of the ruling below is "fundamental to the further conduct of the case." Although the Court of Appeals apparently left the way open for further proceedings by the Board, [32] in any such further proceedings the Board would be required to apply the Act as construed by the decision below. Under such a test, the Board might well be unable to make the necessary findings (cf. *supra,* p. 19, n. 28), and be compelled to dismiss the proceedings. Thus, a failure to obtain review of the decision below at this stage of the case may result in denial to the Board of any review at all.

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[32] The court did not expressly remand to the Board for further proceedings, but merely stated that the Board might "decide, in the light of this opinion, to proceed further against Transamerica * * *" (R. 10084).

CONCLUSION

The decision below involves an important question of federal law which has not been, but which should be, resolved by this Court. The case itself is of great significance. It is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER, 1953.

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No. 410

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Petitioner*,

v.

TRANSAMERICA CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 410

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Petitioner,*

v.

TRANSAMERICA CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (CA R. 10075-84)* is reported at 206 F. 2d 163.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1953 (CA R. 10085). The Petition for Certiorari was filed on October 13, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

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*The printed volume containing the proceedings in the Court of Appeals is cited as CA R. For the convenience of the Court, citations to other volumes of the record are preceded by the volume number. The Petition for Certiorari is cited as Pet. Transamerica's exhibits are designated TX; the Board's exhibits are designated BX.

QUESTION PRESENTED

The Court of Appeals for the Third Circuit (Judges Maris, Goodrich and Kalodner) unanimously held that in order to establish the existence of a "tendency to monopoly" violating the pre-1950 version of Section 7 of the Clayton Act, it was necessary first to determine the market area or areas of effective competition of the banks involved, and, second, to determine whether the challenged bank stock acquisitions had brought about a lessening of competition or in other ways moved Transamerica measurably toward monopoly power in the markets so determined.

The Board had found, and neither side contested the finding, that the market areas of effective competition were the local communities in which the banks were located, and the Court below accepted that determination. The Board, however, had refused to take evidence and had made no ultimate or subsidiary findings as to the effects of the acquisitions, whether measured singly or as a group, upon competition in any of these areas or as to other elements reflecting the existence or non-existence of a probable trend to monopoly power in such areas. Instead, its findings were concerned with a five state area which admittedly had no competitive significance and with statistics purporting to measure the business done by Transamerica in these five states lumped together as a single unit. The Board's order was, therefore, set aside with an express recognition that the Board might hold further proceedings to cure these defects to the extent possible.

Petitioner points to no cases in conflict with this decision. Instead, it asserts that the Court below held it necessary to establish that each of the challenged acquisitions individually exhibited a "tendency to monopoly." There was

no such holding. This issue was not before the Court of Appeals and was not in controversy.

Therefore, the question before this Court is whether it should review a unanimous ruling on a point of law by the Court of Appeals for the Third Circuit which is:

(a) clearly correct,

(b) not claimed by the Petitioner to be in conflict with any decision of this Court or of any Court of Appeals,

(c) made in the application of a Federal statute which has been superseded, and

(d) interim in character,

upon the Petitioner's contention that the opinion below can be interpreted to hold something that it did not hold, and that was not then and never has been in issue in this case.

STATEMENT

On June 24, 1948, the Board of Governors of the Federal Reserve System filed a complaint charging that Transamerica's acquisition of stock in 48 named banks violated Section 7 of the Clayton Act (1 R. 1-19). It was the first and remains the only proceeding brought under Section 7 in the Board's 35 year history (1 R. 412).

Protracted hearings were had, resulting in a printed record of 5,388 pages of testimony and 4,058 pages of exhibits. Governor Evans, a member of the Board, was assigned to act as Hearing Officer (1 R. 362). He is not a lawyer, and had no prior experience either as a hearing examiner or in the administration of the antitrust laws.

Governor Evans filed a Recommended Decision (1 R. 289) which, after briefs and oral argument, was adopted substantially verbatim by a divided Board on May 27, 1952 (1 R. 362-402). Neither the Recommended Decision nor the Board's Decision contained any authority for the conclusions reached or any discussion of the reasoning processes employed. The conclusions were merely a paraphrase of the language of the statute.

Under the terms of the Board's order, Transamerica was directed to divest itself of all its stockholdings in 47 banks in the states of California, Oregon, Washington, Nevada and Arizona (1 R. 400-01). The one bank whose stock was not ordered divested was Bank of America in which Transamerica owns not a share of stock today* and at the time of the Board's Decision held only a 5.6% interest (1 R. 371). The stock thus ordered divested is carried on Transamerica's books at $34,000,000 and amounts to 85% of its bank investments (including all interest in Transamerica's majority-owned banks) and 25% of its total assets (BX 3-W, 9 R. 6122, 6137).

Only three Governors, a minority of the full Board, voted to impose this drastic sanction upon Transamerica (1 R. 402). One of these was Governor Evans, sitting, over objection (8 R. 5702), in review of his own Recommended

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*In October, 1952, Transamerica completed the program begun in 1937 of disposing of its stock in Bank of America. In August, 1952, Mr. L. M. Giannini, the only common director between Transamerica and Bank of America, died. These events, occurring after the Decision of the Board, were raised in the Court below by Transamerica's Amended Application for Leave to Adduce Additional Evidence (CA R. 10074). See pp. 25-27 *infra*. Mr. A. P. Giannini, the founder of both Transamerica and Bank of America died during the pendency of the proceedings before the Board.

Decision. Two members did not participate in the decision (1 R. 402). The other two, one the only lawyer and the other the only professional banker voting, dissented (1 R. 402, 408).

The evidence before the Board and its findings show that Transamerica was organized in 1928 and is owned by some 140,000 stockholders, no one individual of whom holds as much as 1% of its shares (3 R. 1944). The company's assets include stock in both bank and non-bank enterprises (BX 3-W, 9 R. 6122, 6125-35) and its bank holdings, which comprise both majority and minority interests, are not confined to any one state or group of states (BX 3-W, 9 R. 6122, 6126-30). Stock in the principal majority-owned banks in issue was acquired between 1930 and 1944 (1 R. 4-6).

Of the 48 banks in issue, one is located in Arizona, 27 in California, three in Nevada, 16 in Oregon and one in Washington (1 R. 363-65). None of these 48 banks operates offices throughout the five states. On the contrary, each is required by Federal and state law to confine its offices to the state in which its principal office is located (1 R. 384). However, in each of the five states here under consideration, statewide branch banking—a system whereby a bank may operate branch offices anywhere in the state where its principal office is located—is expressly permitted and approved by Federal and state law* (TX 102, 14 R. 9309). 12 U. S. C. § 36 (1946).

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*Neither Transamerica nor any of the banks in which it owns stock may organize a new bank or open a new branch without express approval of state or Federal supervisory authorities (1 R. 398; TX 301, 14 R. 9711-9826). In considering applications for such approval, these authorities take into account, among other things, the competitive banking situation in the community where the new bank or branch

In this context, a sharply contested issue at the hearings was whether the geographical area of effective competition for commercial banking services was national in scope (1 R. 182), essentially local (6 R. 3745-46), or statewide (8 R. 5783-87).

The Hearing Officer (1 R. 315) and the Board both found that the local community is the true competitive banking area in the following language:

> "Because of the frequency of need for access to one or more of the services of commercial banks, such banks draw their business largely from areas within which customers may conveniently visit the banks as occasion may require. Thus, in this aspect of their customer relations, commercial banks are largely local, and for the usually needed customer services a distant bank cannot adequately serve a customer" (1 R. 387).

This finding was not contested in the Court of Appeals and is not contested here by Petitioner or Respondent.* It controlled the decision below and is controlling here.

Despite this finding, the Board refused to receive proffered evidence and failed to make any findings as to

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is proposed (*Ibid.*; TX 328, 14 R. 9904, TX 329, 14 R. 9905). Under the so-called "*de novo* rule," acquisition of existing banks rather than organization of new branches is favored for the development of a statewide branch banking system. This rule, enacted into statute in Oregon, Ore. Comp. Laws § 40-2103 (1940), and generally applied by the administrative authorities in the other four states here involved, requires that a bank opening a branch in a smaller community shall do so by absorbing an existing bank rather than organizing a new branch (*e.g.*, 4 R. 2691).

*The Board conceded, Brief for Respondent, p. 51, *Transamerica v. Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (3rd Cir. 1953), and Petitioner does not deny in this Court (Pet. 17-18), that the five states do not constitute an economically or competitively coherent market area.

the effect of the challenged acquisitions upon the competitive situation in any such local market area. The Board simply asserted that the acquisitions in issue violated Section 7 because their effect was probably to restrain trade, substantially lessen competition and tend to create a monopoly of commercial banking in the five-state area (1 R. 399). Only the "tendency to monopoly" question is preserved for review here, since the issue of probable restraint of trade was abandoned below (CA R. 10081) and that of "substantial lessening of competition" is expressly abandoned in the Petition for Certiorari (Pet. 11 n. 19).

The basis of the conclusion that Transamerica's acquisitions tended to create a monopoly was the Board's broad statistical findings. Transamerica majority-owned banks were shown to account for 6.5% of the loans, 7.0% of the deposits and 8.3% of the offices of all banks having head offices within the five-state area (TX 271, 14 R. 9611). Adding to these figures the business and locations of Bank of America, in which Transamerica held only a 5.6% interest, the Board found that the totals for the so-called Transamerica group were 49.97% for loans, 38.85% for deposits and 40.95% for offices (1 R. 399). The extraordinary significance given to Transamerica's small minority interest in Bank of America, since sold, is thus clear. Fully 85% of the business attributed to Transamerica is accounted for by the Bank of America (see TX 271, 14 R. 9611). Within the states, the percentages varied widely, ranging as low as 4 to 5% in the State of Washington (1 R. 388, 392, 393, 410).

The record shows that Transamerica made persistent and repeated efforts to put these generalized statistics in their proper setting by proving the facts as to the actual

competitive effects of the acquisitions (see 1 R. 335-51). It offered testimony of named bank officials, many from competing banks, bank customers, supervisory officials and independent economists who would have testified on competition in the markets where the banks in issue operated, and on the effect of Transamerica's stock acquisitions on that competition (*E.g.*, 4 R. 2773-2857, TX 300, 14 R. 9681-9710, TX 309, 14 R. 9874-79, TX 311, 14 R. 9880-82). This proffered evidence was rejected by the Hearing Officer (see 1 R. 335-51), who was sustained by the Board (1 R. 404), apparently in the belief that a factual examination of the effect upon competition in the competitive market areas was not required in a Section 7 proceeding.

It is hard to ascertain the Board's rationale for this view, for its Decision advances no reasoned support or basis in authority for it. From the brief of counsel before the Board and from intimations in the dissenting opinion of one of the Board members (1 R. 408), it appears that these exclusions of evidence were based on the Board's belief that the "quantitative substantiality" test, applied under Section 3 of the Act in *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293 (1949), was applicable in a case under Section 7.

This position, though abandoned by the Petitioner in this Court, was pressed before the Board and in the Court below (CA R. 10083). The Court of Appeals, however, rejected this view. While recognizing that "the avowed purpose of the Clayton Act was to supplement the Sherman Act by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act" (CA R. 10077), the Court held that the effect prohibited by the statute—whether of a single acquisition or a series of acquisitions—could only be an effect upon "the area or areas of

existing effective competition in which monopoly power might be exercised . . ." (CA R. 10082). The Court further held that even in relation to such areas, the proof could not be limited to statistical aggregates since "tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked" (CA R. 10083). Either of these points was, by itself, sufficient to sustain the judgment.

Since the Board had complied with neither of these requirements, and had made no findings, statistical or otherwise, relating to the relevant local areas which it had found to be the areas of effective competition, its order was set aside as inadequately supported by its findings.

The Court specifically left open the possibility of further proceedings before the Board (CA R. 10084), in which the Board would have an opportunity to present evidence, if there be any, of a tendency to monopoly in some or all of the community areas involved (CA R. 10082-83).

REASONS FOR OPPOSING THE GRANT OF THE WRIT

I.

THE QUESTION RAISED IN THE PETITION IS NOT OF THE CHARACTER SPECIFIED BY THE RULES OF THIS COURT AS APPROPRIATE FOR REVIEW HERE ON WRIT OF CERTIORARI

A. The Court below correctly decided that a "tendency to monopoly" violating Section 7 of the Clayton Act can only be found on the basis of a factual analysis of competitive conditions within a market area and that such a market area must be shown to be an area of effective competition.

The Petitioner's interpretation of the decision below is incorrect (Pet. 3, 14). The Court of Appeals did *not* hold

that a tendency to monopoly under Section 7 could not be shown by an examination of the cumulative impact of a series of acquisitions, absent a showing as to the effect of each stock acquisition. Petitioner's frequent references to this asserted holding are not supported by any citation to the opinion below (Pet. 3, 14, 18, 19). This holding which, it asserts, is the "one issue" which it "asks this Court to review" (Pet. 14), is not the holding of the case.

The Court of Appeals never addressed itself to that issue. Nor could it have, for the question was never in controversy between Transamerica and the Board. Transamerica has never denied that the tendency to monopoly prohibited by Section 7 of the Clayton Act might be demonstrated by showing the aggregate competitive consequences of a series of acquisitions, even though the prohibited tendency might not appear in all the acquisitions, individually considered.

What Transamerica did contend, and what the Court below held, was that before there could be any showing of the impact of acquisitions for the purposes of the Section, whether of an individual acquisition or a series of them, the Board must first define a market area within which a competitive effect might be observed, *i.e.*, "the area of effective competition." *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293, 299-300 n. 5 (1949) (CA R. 10082). It was the absence of any attempt on the part of the Board to relate its evidence to any area of effective competition, that the Court of Appeals "particularly stressed" as erroneous in setting aside the Board's order (Pet. 2).

In the face of this Court's decisions, it is hard to see how the Court of Appeals could do otherwise. In opinion after opinion dealing with the problems of monopoly, this

Court has emphasized that the necessary threshold problem is to define the market in which the alleged monopoly operates. *E.g., United States* v. *Columbia Steel Co.*, 334 U. S. 495, 512, 516, 520 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166-68, 172-73 (1948); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 610-12 (1953); see *Standard Oil Co. of Calif.* v. *United States, supra*, at 299-300 n. 5. This is a necessary result of the Court's well-established definition of monopoly as market power, the power arbitrarily to control prices and exclude competitors in a market. *E.g., American Tobacco Co.* v. *United States*, 328 U. S. 781, 811 (1946); *United States* v. *Griffith*, 334 U. S. 100, 107 (1948).

The parties are agreed that the Court below was correct when it said "it was not necessary for the Board to find that Transamerica has actually achieved monopoly power" (CA R. 10082). But to speak of tendency to monopoly—that is, an approach towards a position of market power—without reference to the market framework which is fundamental to the concept of monopoly, is to divorce the discussion from all relation to reality.*

The deficiency in the Board's decision is that the statistical aggregations upon which it is based did not reveal percentage of occupancy or approaching market control in

*Even the Petitioner is unable to dissociate tendency to monopoly from the market concept. The Petitioner itself asserts that there was a "corresponding decline *in the share of the market* held by non-Transamerica banks," and that Transamerica had "captured 40% *of a market* . . ." (Pet. 16). The very passage from the legislative history of the amended Section 7 upon which the Petitioner relies states that "*control of the market* . . . may be achieved not in a single acquisition but as a result of a series of acquisitions" (Pet. 15) (Emphasis supplied).

any of the markets as defined by the Board itself. There is no controversy about this point. The Board itself, before the Court of Appeals, and the Petitioner here, concede that the five states involved do not constitute a market. See p. 6 n. *supra*. Indeed, as Judge Maris said, the concept of a five-state market "flies in the face of [the Board's] own finding that the local community is the true competitive banking area" (CA R. 10082).

Nor is there any validity to the Petitioner's apparent suggestion that tendency to monopoly in all the constituent markets may be inferred from the figures aggregrated for the five states (Pet. 18). In the first place, Transamerica was not permitted to rebut any such inference. Evidence to show absence of any tendency to monopoly in various individual communities was consistently excluded by the Board (see, *e.g.*, 7 R. 4474-78, 4480-85, TX 300, 14 R. 9681-9709; and see generally Brief for Petitioners, pp. 45-53, *Transamerica Corp.* v. *Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (3rd Cir. 1953)). Moreover, any such inference is at variance with the record, for it is clear from the fragmentary evidence that does appear there that wide variations would be found between community markets (see generally BX 16, 10 R. 6855-6955; TX 303, 14 R. 9830-67).

The necessity, in any rational administration of the Clayton Act, for the evidence of tendency to monopoly to be related to the market area as defined may be illustrated by a simple example. If the Board had included the acquisition by Transamerica of its 7% stock interest in National City Bank of New York (Pet. 5 n. 5) in the violations charged in its complaint, then, on its theory, the loans, deposits and offices of all the banks in the State of New York would have to be added to the totals against which the percentage share

of the so-called "Transamerica group" was measured. This simple change in the complaint could not alter the actual tendency or lack of tendency of Transamerica to a monopoly in the community markets which its banks serve. Yet such a change, obviously, would have led to a drastic shrinkage in the percentages attributed to Transamerica in the Board's findings.

The fallacy of the Board's position may be demonstrated in yet another way—by considering the character of the relief which it permits. The present case provides a good example. The Board has ordered the divestiture of $34,000,000 of shares in 47 banks. In each of two states, Arizona and Washington, Transamerica owns only one bank (1 R. 365). The mere substitution of another owner of these banks for Transamerica, which is all the Board's order would accomplish, could not affect the competitive situation in these two states at all. In fact, there are only ten community markets in the entire five states where this vast and drastic dislocation of Transamerica's affairs could possibly affect by one iota the competitive situation.* Any view of the law which can lead to such a necessarily futile and arbitrary exercise of administrative power must fall of its own weight. *Cf. United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166-75 (1948).

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*In only ten of the communities was Transamerica found to control more than one bank, so that only in those ten communities is there even a possible basis for an inference that some change in the competitive picture would result from the divestiture ordered (CA R. 10080). Evidence of the effect of such control in these ten communities was not taken (*ibid.*). In any event, in nine of these communities the second bank is a Bank of America branch (5 R. 3123-61), and the question of Transamerica's control of this institution must in any event remain open in the light of events occurring since the Board's decision. See pp. 25-27, *infra*.

The Court of Appeals holding that "tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked" (CA R. 10083) is equally clearly correct and in accord with the well-established precedents. *International Shoe Co.* v. *FTC*, 280 U. S. 291 (1930); *V. Vivaudou, Inc.* v. *FTC*, 54 F. 2d 273 (2d Cir. 1931); *Aluminum Co. of Am.* v. *FTC*, 284 Fed. 401 (3rd Cir. 1922); *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio 1935); *United States* v. *Standard Oil Co. of N. J.*, 47 F. 2d 288 (E. D. Mo. 1931); *cf. Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948); *United States* v. *Aluminum Co. of Am.*, 148 F. 2d 416 (2d Cir. 1945). *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948), in which the Court said it was applying the policies of Section 7, *id.* at 507 n. 7, is only the most explicit of a number of cases in this Court and Courts of Appeals emphasizing the empirical character of the analysis required to establish monopoly or tendency to monopoly. In that case the Court said:

> "The relative effect of percentage command of a market varies with the setting in which that factor is placed." *Id.* at 528.

The clear import of these and other cases is that, though the percentage figures, if properly related to a competitive market, may in the end turn out to be persuasive, neither the enforcing agency nor the reviewing court may hold them to be decisive without at least receiving and considering evidence of other competitive factors. In this case, not only did the Board fail to pursue such an investigation of its own

motion, but it also refused to permit Transamerica to introduce evidence on these other factors qualifying the significance of the percentage figures.

In the Court below, the Board was at least logically consistent, for it defended this refusal on the authority of *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293 (1949), where broad exclusions were sustained by this Court in a proceeding under a wholly different Section of the Clayton Act. The Petitioner, before this Court, has abandoned this position and advances no justification whatever for the wholesale refusal to take evidence on business and competitive facts to illuminate the meaning of the percentage statistics.

At most, the Petitioner here might contend that the Board's findings would support an inference of violation of the statute. Surely that inference is open to rebuttal, however. Yet every attempt by Transamerica to rebut the inference by direct evidence of competitive effects in the markets concerned was thwarted by the exclusionary rulings of the Board, as the Board itself admitted below. Brief for Respondent, pp. 43-44, *Transamerica Corp.* v. *Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (3rd Cir. 1953). Thus on the Petitioner's own theory, the case cannot finally be determined against Transamerica without a remand to the Board to take this evidence. For that reason alone, the case is not a proper one for review here.

The same observation serves to dispose of Petitioner's reliance on the asserted finding that Transamerica had the power to suppress potential competition (Pet. 3, 10, 18). The Board made no such finding. It did say that "as the size and resources of a banking group increase, its power

to suppress potential competition increases" (1 R. 398). Not only is this finding internally inconsistent,* but it studiously avoids a determination that Transamerica had such power. And well it might, for on this issue again, the Board expressly refused to permit Transamerica to introduce evidence refuting the existence or approach of power to suppress potential competition. For example, Transamerica was prevented from showing that entry into the banking business throughout the five states under consideration was substantially freer than in other sections of the country (*E.g.*, TX 250, 14 R. 9486-89; see 5 R. 3112-18). There are wholesale exclusions of direct testimony of local businessmen and bankers proffered on the point in issue (TX 300, 14 R. 9681; TX 309, 14 R. 9874; TX 311, 14 R. 9980).

There is only one factual matter bearing on tendency to monopoly on which the record does throw some light, and it goes to negative any such tendency. That factor is the effect of the acquisitions on competition between the acquired banks. This, as the Court below said, "is clearly relevant in the determination of the existence of a tendency to monopolize" (CA R. 10082), although it was careful not to say that it is controlling. That this is so seems too patent for argument. Yet on this one point of factual com-

*The board asserts that a large banking organization can "enter a community before it is clearly apparent that a bank is warranted" and pre-empt favorable locations. It is difficult to see how this is possible when, in the same paragraph, it states, "Authorization must first be secured from regulatory agencies before new banks or branches may be established," and that such authorization is based, among other things, on "the effect of such establishment upon existing banks and the availability of business to support the new bank and permit its successful operation" (1 R. 398).

petitive significance, it appears on the face of the record that there was no lessening of competition between the banks as to 38 of the acquisitions and no showing of any lessening as to the other ten (CA R. 10080). So convincing is Judge Maris' analysis on this point (CA R. 10079-81), that the Acting Solicitor General has abandoned the contrary contention in his Petition here.

Finally, the Petitioner's complaint that the decision below makes it impossible for the Board to proceed against Transamerica or other bank holding companies (Pet. 20-21) is equally without merit. The Court of Appeals itself disposed of this suggestion:

> "We, of course, do not hold that no tendency to monopoly by Transamerica in commercial banking could be shown in any of the competitive areas in which its acquired banks operate. It may well be that in some of these areas Transamerica through the acquisition of banks has brought about a substantial lessening in competition and in that and other ways has moved measurably toward monopoly power in those particular areas. The Board has made no such findings, however, nor has it made appropriate supporting findings as to the factors which an analysis of the market would disclose to be relevant to the determination of these questions" (CA R. 10082-83).

See also Adelman, *Acquire the Whole or Any Part of the Stock or Assets of Another Corporation,* Proceedings ABA Section of Antitrust Law, August 26-27, 1953, p. 111, 114.

The fact of the matter is that this is the only case the Board has ever brought under Section 7 of the Clayton Act as it existed prior to the amendment, and if, in the

future, it desires to proceed against bank holding companies, it has available the new statute establishing quite different prohibitions. See pp. 19-22 *infra*. The decision below does not frustrate the Board's enforcement of the Congressional mandate even under the old statute, applicable here. What Petitioner is really complaining of is the Court's insistence that the Board confine its exercise of authority within the limitations laid down by that statute. A tendency to monopoly can only exist in a defined market area; and the Court below rightly refused to permit the Board to substitute its predilections about "bigness" for the prescribed statutory standards to be applied in accordance with well-established rules and procedures.

B. The decision below is not in conflict with applicable decisions of this Court or with other decisions of Courts of Appeals on the same matter.

It has already been demonstrated in Part A above that the decision below accords fully with the governing precedents from this Court both in requiring definition of the market, see p. 10-11 *supra*, and in requiring factual evidence of a prohibited tendency within the market. See p. 14 *supra*.

As to the appellate decisions construing Section 7, the Court of Appeals for the Third Circuit has rendered nearly half of them, more than any other appellate court in the country. *Pennsylvania R. Co.* v. *ICC*, 66 F. 2d 37 (3d Cir. 1933), *affirmed by an equally divided Court*, 291 U. S. 651 (1934); *Temple Anthracite Coal Co.* v. *FTC*, 51 F. 2d 656 (3rd Cir. 1931); *Thatcher Mfg. Co.* v. *FTC*, 5 F. 2d 615 (3rd Cir. 1925), *reversed in part, on other grounds*, 272 U. S. 554, 560 (1926); *Aluminum Co. of Am.* v. *FTC*, 284 Fed. 401 (3rd Cir. 1922), *cert. denied*, 261 U. S. 616

(1923). The Court below relied squarely upon the prior appellate decisions (CA R. 10080, 10083), and the Petitioner apparently recognizes their continuing force (Pet. 20). It seeks to distinguish them, however, on the ground that they deal with acquisitions of manufacturing companies rather than banking companies (*ibid.*), surely a tenuous point of difference. If anything, stock acquisitions involving "industrial firms which competitively invade market areas far from their home offices" (*ibid.*) would seem far more likely to fall afoul of the Clayton Act than acquisition involving banks, which the Board found to compete primarily in local markets.

C. The decision below does not involve a question of general importance, since the statute which it construed has been superseded.

The complaint in this case was filed, the hearings held, the order made, and the appeal argued and decided all under Section 7 as it existed prior to the Act of December 29, 1950, 64 Stat. 1125, 15 U. S. C. § 18 (Supp. V 1952). The new Section, now three years old, will be the governing statute for future actions brought by the Board and other enforcing agencies of the Clayton Act.

The new Act, the end result of intensive Congressional consideration beginning in 1945, drastically revised the entire Section. The committee hearings, investigation, study and debate over the five year period became the vehicle for a thoroughgoing reassessment of Congressional policy towards inter-corporate mergers and stock acquisitions.

A review of this legislative history makes it perfectly clear that Congress meant to strengthen the prohibitions against corporate amalgamation, whether by stock acquisitions or otherwise. Contrary to Petitioner's assertion (Pet.

3 n. 1, 15-16), this change was applicable equally to the "substantial lessening" and "tendency to monopoly" clauses of the revised statute. The Senate Report specifically indicated those portions of the old Section 7 that were to be carried over without change. S. Rep. 1775, 81st Cong., 2d Sess. 6 (1950). No such indication appears as to the "tendency to monopoly" portion of the old Section. Instead the Report expressly states:

> "it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained [*i. e.*, 'substantial lessening' and 'tendency to monopoly'] than has been given in the past." *Id.* at 4. See also H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).*

If the Court should grant review of this case and decide in favor of Transamerica, it would necessarily leave open for future decision the question of the effect to be given this portion of the legislative history in the administration of the new Section 7.

On the other hand, if the Court should decide against Transamerica on the present record, it must hold, at least implicitly, that direct factual evidence of competitive effect in the relevant markets may be excluded by blanket rulings in proceedings under the old Section 7. Such a holding could provide no assistance in the administration of the re-

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*See *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 741 (2d Cir. 1953); Carson, *Corporate Mergers*, CCH Antitrust Law Symposium 167 (1952); Montague, *The Celler Anti-Merger Act*, 37 A. B. A. J. 253 (1951); Celler, *The New Anti Merger Statute*, *id.* at 897, 900; Note, 64 Harv. L. Rev. 1212 (1951).

vised Section, for it would not give any force to the clear Congressional expectation that henceforth, the prohibited effects were to be demonstratd by factual analysis of the competitive structure of the market.

> "It is expected that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition." S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950). See also H. R. Rep. No. 1191, 81st Cong., 1st Sess. 6-8 (1949).*

It is apparent that whatever decision the Court might make in this case, it would remain open to counsel in future litigation before the Federal Trade Commission or the lower courts to urge that the statutory change calls for a different result. Indeed, neither the Federal Trade Commission nor the Antitrust Division of the Department of Justice, the two agencies principally responsible for the enforcement of Section 7 and best acquainted with the legal and policy problems involved, has had any part in the preparation or trial of this case. The orderly development of the new statute can best be promoted by deferring consideration of these issues of law and statutory construction by this Court until a case is presented which arises under and is oriented toward that statute, and where the views of the principal enforcing agencies are fully developed for the Court.

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*See also Adelman, *Acquire the Whole or Any Part of the Stock or Assets of Another Corporation,* Proceedings ABA Section of Antitrust Law, Aug. 26-27, 1953, p. 111, 117-23; Note, 64 Harv. L. Rev. 1212 (1951).

II.

THE CASE DOES NOT COME TO THIS COURT IN A POSTURE APPROPRIATE FOR REVIEW.

A. There are numerous other points supporting the judgment below which would be argued by Respondent and would have to be considered by this Court if certiorari should be granted.

The "tendency to monopoly" issue on which the Petitioner seeks review of the decision below does not arise on this record as an isolated question dispositive of the case. Indeed it is only one of several points, all supporting the result below, which would have to be urged here if certiorari should be granted. These include:

(1) the absence of power in the Board, under Sections 7 and 11 of the Clayton Act, to bring this proceeding (CA R. 10061);

(2) the refusal of the Board to admit evidence clearly relevant to the determination of the "line of commerce" or functional market involved, of competition by insurance companies, savings and loan associations, finance companies, government lending and depositary agencies and other non-bank institutions in providing lending and depositary services (CA R. 10064);

(3) the improper standards which governed the calculations by which the Board arrived at the statistical percentages in its findings (CA R. 10065);

(4) the repeated arbitrary and inconsistent rulings of the Hearing Officer, sustained by the Board, which amounted to a denial of a fair hearing to Transamerica, and were expressly stated by two of the five Board mem-

bers voting to have denied Transamerica its "day in court" (*Ibid.*);

(5) the lack of constitutional due process, in proceedings contemplating an ultimate judicial decree, in that compulsory process by subpoena or otherwise was not available for the production of witnesses and evidence (CA R. 10065-66);

(5) the excessive and inappropriate character of the relief granted. See Brief for Petitioner, p. 74, Reply Brief for Petitioner, p. 6, *Transamerica Corp.* v. *Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (3rd Cir. 1953).

All of these points were specified as error, briefed to the Court below and are fully preserved here. A number of them require elaborate analysis of the 14 volume record, in which this Court would not have the assistance of prior consideration by the Court of Appeals, which properly found it unnecessary, in the view it took of the case, to pass on most of them (CA R. 10084).

There are two other questions remaining at large, which deserve special mention here because of their immediate bearing on the issue of granting the writ.

B. The decision of the Board does not meet the minimum standards prescribed by this Court for Findings of Fact and Conclusions of Administrative Tribunals.

The Board's Decision does not disclose the reasoned relation of legal rules to the facts found which distinguishes quasi-judicial decision from administrative fiat, and which has been found necessary by this Court to a proper review of decisions of administrative agencies. Only a few short months ago, the Court said:

> "While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review." *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 81 (1953).

Just such inability to understand what really lies behind the Board's conclusions appears in this case. The Board in its Decision did not make the slightest effort to reveal the standards which it thought it was applying or how they related to the facts which it found. For all that appears in the Decision, it would not have changed matters if the critical percentages had been 30 or 20 or even 10%, instead of the 40% found by the Board.

The Board sought to supply such a rationale for the first time in its brief to the Court of Appeals, and the Acting Solicitor General has suggested a wholly different rationale in his Petition for Certiorari. But these do not cure the defect:

> "In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. [Citations] We must know what a decision means before the duty becomes ours to say whether it is right or wrong." Cardozo, J., in *United States* v. *Chicago*

M., St. P., & P. R. Co., 294 U. S. 499, 510-11 (1935).

Accord: *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196-97 (1947); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943); *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-89 (1942); *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86-87 (1930). *Cf. Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940) and cases cited; *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 480 (1952) (Jackson, J., dissenting).

C. Any decision this Court might make on this record would require remand to the Board for reconsideration of its central finding that Transamerica controls Bank of America, in view of the new facts raised by Transamerica's petition to adduce additional testimony.

If the Court were to sustain the Board on every contention made by the Petitioner in its brief, it still could not finally dispose of this controversy. It has already been pointed out that, without the business of Bank of America, the percentages attributed by the Board to Transamerica would shrink to almost minuscule proportions. See p. 7 *supra*. The Board's Solicitor repeatedly conceded that without Bank of America he had no case at all (*E.g.*, 2 R. 1329-30). Thus the Board's finding that Bank of America was controlled by Transamerica is a necessary prerequisite of the order, even on the Board's own view of the case.

Transamerica, of course, contested the control issue before the Board (see, *e.g.*, 1 R. 348, 356). Although it continues to believe that the finding was incorrect upon the record before the Board, it is no longer necessary to inquire whether that finding is supported by evidence on the record

as a whole. See *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951). Subsequent events have completely changed the picture as the Board saw it or could reasonably contemplate it at the time it issued its Decision. Among these events are the disposal of the last remaining shares of Bank of America stock by Transamerica; the death of Mr. L. M. Giannini, one of the foundations of the Board's control finding and the last link between the Board of Directors of Transamerica and Bank of America; the elimination of all common officers or directors between Bank of America on the one hand and Transamerica and its subsidiary banks on the other; the installation of a new President and Chairman of the Board of Transamerica.*

Certainly it is not for this Court or the Petitioner to say how the Board would view the impact of these events upon the control relationship which it found. See *NLRB* v. *Indiana & Mich. Elec. Co.,* 318 U. S. 9 (1943). They are serious and pervasive enough to require complete reconsideration of that finding. If the Board should conclude, in the light of these facts, that the asserted control relationship had been terminated, the Board's entire case would fall. At the very least, the drastic character and scope of the relief ordered would have to be revised. In the light of these possibilities it becomes apparent that any decision rendered by the Court in this case may well turn out to be academic

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*Some of these events have occurred even later than the filing of the Application to Adduce Additional Evidence in the Court below (CA R. 10074). These later events could, of course, be brought to the attention of this Court by an amendment to the Application. The Court of Appeals specifically noted that the matters mentioned in the Application could be raised upon further proceedings before the Board (CA R. 10084).

and purely advisory, and without any relation to the disposition of the controversy.

Since all the questions now urged by the Petitioner will be preserved for this Court on review of the proceedings before the Board, if any, on remand from the Court of Appeals, there is no reason which should move the Court to grant review of this case at this premature stage.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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November 12, 1953.

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 410

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

TRANSAMERICA CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The two contentions made in the brief in opposition are (1) that the question presented by the petition is not of the character specified by the Rules of this Court as appropriate for review by certiorari and (2) that the case is not in a posture appropriate for review.

1. The three grounds advanced in support of the proposition that the question presented by the petition is not of a character appropriate for review are (a) that the decision below is correct, (b) that it is

not in conflict with other applicable decisions, and (c) that since it involved a statute which has been superseded, it is not of general importance. This reply will be confined to the third ground. As our petition dwelt with the merits of the decision below (Pet. 15-21), and we will not repeat the views there stated. As to conflict of decisions, the petition did not give this as a reason for granting review.

Respondent urges (Br. in Opp. 19-21) that, because Section 7 of the Clayton Act was amended in 1950, any interpretation by this Court of the "tendency to monopoly" provisions of the original section would be of doubtful application to proceedings under the amended section. We take issue with this contention. The language of the original section, which prohibits acquisitions where the effect may be to "tend to create a monopoly of any line of commerce," was retained in the revision. The section, as amended, prohibits acquisitions "where in any line of commerce in any section of the country, the effect * * * may be * * * to tend to create a monopoly."[1] The additional phrase "in any section of the country" does not expand the section's scope. The prohibition against stock ac-

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[1] The amended section reads in pertinent part (15 U.S.C. 18):

> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

quisitions which tend to create a monopoly of "any line of commerce," like the corresponding prohibition against monopolization of "any part" of interstate commerce in Section 2 of the Sherman Act, clearly has both distributive and geographical application.

Nor does the legislative history of the 1950 amendment show any purpose to change the "tendency to monopoly" portion of Section 7. Respondent quotes (Br. in Opp. 20) a statement by the Senate Judiciary Committee that the changes which were being made were designed to "assure a broader construction of the more fundamental provisions that are retained." This statement has specific reference to changes other than the section's "tendency to monopoly" provisions. The Committee report pointed out that Section 7 had prohibited acquisitions where the effect may be to substantially lessen competition between the acquiring and the acquired corporation, or to restrain commerce in any "community." The Senate Committee believed that the "excessive sweep" of these provisions had been "largely responsible for the tendency of the courts in cases under that section to revert to the Sherman Act test." By elimination of these provisions,[2] which the Committee said "appear to reach situations of little economic significance," it was the legislative purpose to assure

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[2] In lieu of the eliminated effect clauses, the amended section makes unlawful acquisitions where the effect may be "substantially to lessen competition" in any "line of commerce" in any "section" of the country.

a broader construction of the section's more fundamental provisions. S. Rep. 1775, 81st Cong., 2nd Sess., p. 4.

The second statement from the Senate Committee report which respondent quotes (Br. in Opp. 21) relates solely to the question whether the amended section would prevent acquisition of stock or assets of companies in a failing or bankrupt condition. The Committeee stated its belief that the amendment would make no change in the "judicial interpretation [of Section 7] on this point" in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291. S. Rep. 1775, *supra,* p. 7.

2. Respondent urges that the case is not in a posture appropriate for review, upon three grounds: (a) that, if review is granted, respondent would present to this Court numerous contentions not passed upon by the court below, (b) that the Board's report does not set forth the grounds of its decision with sufficient clarity, and (c) that, if this Court reverses the decision below, the case would have to be remanded to the Board for reconsideration.

The first and second grounds require, we believe, little reply. This Court need not consider questions not passed on below, but may, if it reverses on the point presented by the petition, remand for consideration of the other issues. We additionally note, as to the second ground, that respondent did not urge in the court below that the Board's report does not disclose its *ratio decidendi* with sufficient explicitness (R. 10061-6).

The substance of respondent's third ground is that even if the court below adopted an erroneous construction of the statute, this Court should not grant review because, notwithstanding reversal of the decision below, further administrative proceedings will be necessary. Respondent asserts that in these circumstances any decision rendered by this Court would be "academic and purely advisory" (Br. in Opp. 26-27). But when, as here, review is sought of a ruling "fundamental to the further conduct of the case," the decision on review plainly is not "academic," and writ of certiorari properly should be granted (see Pet. 22).

Furthermore, it is by no means clear that, because of events occurring since entry of the Board's order, further administrative proceedings will be necessary. Respondent suggests that the sale of its remaining holdings of Bank of America stock, elimination of interlocking directors of the two companies, the death of L. M. Giannini, and installation by respondent of a new president and chairman of its board [3] "have completely changed the picture as the Board saw it or could reasonably contemplate it at the time it issued its Decision" (Br. in Opp. 26). However, respondent's sale of its remaining

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[3] The new president and chairman is F. N. Belgrano, Jr. (Commercial and Financial Chronicle, 6/15/53, p. 10). This new top executive has occupied important positions in the Transamerica system for at least 20 years. He is a past vice-president of Bank of America, a one time member of an Advisory Council which had the duty of determining "management policies for the entire group of Transamerica's banks," and he has also been president of various Transamerica banking and non-banking subsidiaries (R. 372, 380).

Bank of America stock is not, in reality, a new factor. The Board did not base its finding of control of Bank of America on the percentage of stock of this bank then owned by respondent, but on a detailed analysis of the long and intimate affiliation of the two companies (R. 372-82).

Contrary to respondent's contention, the Board anticipated the possibility that Transamerica might dispose of the remainder of its Bank of America stock, and expressly found that control would continue even if Transamerica were to divest all of that stock (R. 399-400). The Board summarized its conclusion on this aspect of the case as follows (R. 399):

> The long and close association of Bank of America in aiding in constructing the Transamerica group, the unity established over the years, the personal associations and relationships among important officials in Transamerica and Bank of America, and similar intangible factors, provide sound reason to believe that even if Transamerica were required to divest itself of the stock it now holds in Bank of America, the existing relationship between Transamerica and Bank of America would continue.

Respondent also contends (Br. in Opp. 15) that the case will have to be remanded to the Board for the taking of additional evidence, because the Board erroneously excluded evidence as to the competitive effect of respondent's stock acquisitions. But the excluded evidence related to the alleged "absence

of any tendency to monopoly in various individual communities" in which particular acquisitions took place (Br. in Opp. 12; see also 6-7). Whether or not such evidence was properly excluded turns on the basic question which the petition presents, whether the Board may base a finding of tendency to monopoly on the cumulative effect of a large number of acquisitions in the five-state area in which its banking subsidiaries operate, without determining the local competitive effect of specific acquisitions.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

NOVEMBER, 1953.